Procedural History

1. Defendant Fred Hines was arrested on May 20, 2021, and has been indicted on three counts by the Grand Jury of Polar Bear County.

2. The first count is Corrupting Another With Drugs pursuant to ORC 2925.02(A)(4)(a), 2925.02(C)(1).

3. The second count is FELONIOUS ASSAULT-F2 pursuant to ORC 2903.11(A)(1), 2903.11(D)(1)(a).

4. The third and final count is ENDANGERING CHILDREN-F3 pursuant to ORC 2913.22(A), 2919.22©(2)(c).

5. A preliminary hearing was held on May 21, 2021.

Statement of Facts

1. Defendant Fred Hines and his wife Sally Hines agreed to babysit Caden Thomas on May 18, 2021.

2. On May 19, 2021, Sally Hines called 911 after discovering Caden acting lethargically and Defendant Fred Hines made her aware that he may have put Adderall in Caden's bottle.

3. Detective Sampson and EMTs arrived at the Hines residence on May 19, 2021, at approximately the same time, in response to the 911 call made by Sally Hines. Without a search warrant or receiving the consent of Defendant Fred Hines, Detective Sampson entered the premises. While within the Defendant's home, Detective Sampson separated the Defendant and his wife and proceeded to conduct a custodial interrogation of the Defendant. Detective Sampson did not read the Defendant his *Miranda* rights. While conducting this interrogation, the

Defendant made certain incriminating statements, specifically, that "he may have put Adderall in the bottle" of Caden Thomas. In the process of this interrogation, Detective Sampson also obtained a pill bottle and the bottle of Caden Thomas from inside the Defendant's home.

4. On May 19, 2021, Caden Thomas was taken to the local hospital by EMTs and subsequently transferred to Nationwide Children's Hospital where doctors claim to have discovered amphetamines present in his bottle.

5. On May 20, 2021, Defendant Fred Hines was arrested. While in custody and without the presence of counsel, Defendant Fred Hines again made certain incriminating statements, specifically, he stated that he "may have accidentally put Adderall in the bottle" of Caden Thomas as a reaffirmation of this statement made the day before.

6. Defendant Fred Hines was indicted on the three counts recited above.

7. A preliminary hearing was held on May 21, 2021, during which Detective Sampson testified. He recited the incriminating post and pre-arrest statements made by Defendant Hines and the manner in which Detective Sampson acquired the physical tangible evidence from Defendant Fred Hines' home

8. Defense counsel now requests that the pre and post-arrest statements of Defendant be suppressed in addition to the tangible physical evidence on the grounds that the police violated Defendant's constitutional rights.

Argument in Support

The Fourth Amendment of the United States Constitution states in relevant part "[t]he right of the people to be secure in their persons, houses papers and effects against unreasonable searches and seizures shall not be violated…" U.S. Const. amend. IV. While there is no explicit requirement in the Fourth Amendment that a warrant be issued in order to conduct a search, it has been long recognized that unless a valid search warrant based upon probable cause was issued, a search is unconstitutional, unless a valid exception to the warrant requirement existed. In order to determine whether a defendant can assert a violation of his Fourth Amendment rights, the Supreme Court held in *Rakas v. Illinois* that the question is "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*. If a defendant can satisfy that the Fourth Amendment was designed to protect the area at issue, whether the suppression of evidence should be granted is answered by assessing whether the defendant "had an interest in connection with the searched premises that gave rise to 'a reasonable expectation (on his part) of freedom from governmental intrusion' upon those premises." *Combs v. United States*. There is no question that a defendant has this reasonable expectation of privacy of their own home. *Kyllo v. United States*.

In the present case, Detective Sampson entered the home of the Defendant on May 19, 2021, and by his own testimony, without a search warrant. The Defendant never consented to the detective's entrance into the premises and indeed probably felt he had no right to object to the detective's presence, once the detective was within the home. While the Defendant did indeed have this right under the Supreme Court's decision of *Georgia v Randolph*, he did not know this and was never informed of this by the detective. *Georgia v. Randolph*. Because he had no knowledge that he could object to the officer's being there after his wife's consent, coupled with

the fact that he himself never consented to the detective's presence, a warrant was needed to enter the premises and conduct a search and seizure of any evidence.

Here, Defendant Hines can assert a violation of his Fourth Amendment rights due to his interest in the home, "which the Fourth Amendment was designed to protect." *Rakas v. Illinois*. The physical evidence must be suppressed because the Defendant had an interest "that gave rise to a reasonable expectation of freedom from governmental intrusion…" *Combs v. U.S.* Both of these tests are satisfied here as this was the Defendant's own home and as such he held a reasonable expectation of privacy.

A warrantless search was conducted when Detective Sampson asked the Defendant to give him the pill bottle which contained the pills the Defendant admitted he may have put into the baby's bottle. *Defendant's statement to police dated 5/20/21*. The Defendant also gave the detective the baby's bottle upon request. The seizure occurred when the detective took the pill bottle and the baby bottle and placed them into a sealed evidence bag which Detective Sampson testified to at the preliminary hearing. *Transcript of preliminary hearing 5/21/21*. The detective's actions constituted a warrantless search and seizure which could only be lawful if there was a valid exception to the warrant requirement. In the present case there was no valid exception to the warrant requirement.

There are only two colorable exceptions that can be raised to the warrant requirement in this case and neither applies. The first is consent which has been addressed above as being invalid. The second possible exception is that this is an exigent circumstance due to safety concerns of someone within the home. The Supreme Court held in the case of *Brigham City, Utah v. Stuart*, that the police may enter a home if they have an "objectively reasonable basis for believing" that an occupant is injured. *Brigham City, Utah v. Stuart*. While the State, in this case,

may argue that Detective Sampson had such a concern, due to the nature of the 911 call, by his own testimony, the EMTs and Detective Sampson arrived at the home at the same time. *Transcript of preliminary hearing 5/21/21*. The EMTs, not Detective Sampson were the medically trained professionals that were capable of addressing the medical emergency and thus their presence removes any truly colorable claim by the State that this was an exigent circumstance under which no warrant was required for Detective Sampson to conduct a search and seizure.

Because no warrant was issued prior to the conducting of the search and seizure in this case, and no valid exception to the warrant requirement was present, both the pill bottle and the baby bottle were obtained in violation of the Defendant's Fourth Amendment rights and as such, must be suppressed.

The Fifth Amendment to the United States Constitution states in relevant part that "[n]o person… shall be compelled in any criminal case to be a witness against himself…" U.S. Const. amend. V. This establishes that all defendants in criminal cases have a privilege against self-incrimination. The Supreme Court has held that the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment privilege against self-incrimination to apply against the States. *Malloy v. Hogan*. Pursuant to the Supreme Court's decision in *Miranda v. Arizona*, when a suspect is in custody and being interrogated, the Fifth Amendment privilege against self-incrimination requires that a suspect be informed of their right to remain silent and their right to an attorney. *Miranda v. Arizona*. To be in custody for purposes of *Miranda*, the Supreme Court held in *Oregon v. Mathiason,* that custody means that a suspect has been "deprived of his freedom of action in any significant way." *Oregon v. Mathiason*. Essentially, custody is determined if a reasonable person would feel free to leave. To be interrogated means, according

to the Supreme Court, that the police are engaging in "express questioning or it's functional equivalent" which means "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from a suspect." *Rhode Island v. Innis*. If a defendant that is in custody and being interrogated is not made aware of their *Miranda* rights, any incriminating statement they make must be suppressed in order to prevent a violation of the Fifth Amendment privilege against self-incrimination.

As established above, on May 19, 2021, Detective Sampson, was present in the Defendant's home. While there, the detective placed the Defendant and his wife in different rooms and questioned them separately. During this questioning, the defendant made an incriminating statement that "he may have put Adderall in the bottle" of Caden Thomas. Detective Sampson admitted while testifying at a preliminary hearing on this matter, that the Defendant never had his *Miranda* rights read to him prior to making this statement. When defense counsel asked Detective Sampson if he informed the Defendant of his *Miranda* rights he responded "[n]o, not at that time" that he only informed the Defendant of his *Miranda* rights after he was arrested on the 20th of May, 2021. When asked if the Defendant was free to leave by defense counsel at a preliminary hearing the detective stated "[w]ell, he was not under arrest at that time. He was in his own home. He did not have to talk to me." But when asked if he had informed the Defendant that he was not required to speak to him, Detective Sampson stated "[n]o." In this situation, both requirements of *Miranda* are met.

The Defendant would not reasonably feel free to end his conversation with the detective and was most certainly "deprived of his freedom of action…" in this situation. *Oregon v. Mathiason*. While Detective Sampson may have stated during testimony that the Defendant was

free not to speak with him, that does not mean that the Defendant believed this to be the case. No reasonable person would have felt free to leave in a situation where a police officer has separated him from his spouse and is questioning him in regards to a possible poisoning of a child under the age of one. As such, the first requirement for *Miranda* rights to be read, that a suspect be in custody, is met here. The second requirement that the suspect be interrogated is also met.

Detective Sampson testified that he had asked Defendant Fred Hines to tell him "what happened." He also testified that he continued to question the Defendant after the child was transported to the hospital. This was express questioning of the Defendant and as such, constitutes an interrogation for *Miranda* purposes. Even if the court were to decide this was not direct questioning, it can be viewed as its "functional equivalent" under the Court's decision in *Rhode Island v. Innis*. Here Detective Sampson should have known when questioning the Defendant, that he was "reasonably likely to elicit an incriminating response" from him. *Rhode Island v. Innis*. Therefore the second requirement for *Miranda* warnings to be read is also met.

Because both requirements of *Miranda* are met for the pre-arrest statement made by the Defendant made on May 19, 2021, that he was in custody and interrogated, Detective Sampson was required to read the Defendant his *Miranda* rights prior to questioning him. Having failed to properly *Mirandize* the Defendant prior to his making the incriminating statement that "he may have put Adderall in the bottle" of Caden Thomas, this statement must be suppressed from evidence in the criminal case against the Defendant. A failure to suppress this statement would constitute a violation of Defendant Fred Hines Fifth Amendment privilege against self-incrimination guaranteed to him by the Fifth Amendment through the Fourteenth Amendment.

The Due Process Clause of the Fourteenth Amendment requires that a confession be made voluntarily. *Brown v. State of Mississippi*. The requirement of voluntariness, ensures that a

defendant's Fifth Amendment privilege against self-incrimination is protected. Determining whether a confession is voluntarily made, is based on the totality of the circumstances. The Supreme Court has stated that mental health is a "significant factor" in determining whether a confession was in fact voluntary. *Colorado v. Connelly*.

Under the present facts, the Defendant's mental health is a "significant factor" to take into consideration in assessing whether his post-arrest statement that he may have put Adderall in the bottle" of Caden Thomas, was voluntarily made. *Colorado v. Connelly*. Under the totality of the circumstances, this incriminating statement was not made voluntarily and as such, it's admission would deprive the Defendant of his Fifth Amendment privilege against self-incrimination. The Defendant told Detective Sampson, that he had been prescribed and taking Adderall for years. Being arrested, separated from his wife, and without the assistance of counsel to guide him, the Defendant's possibly compromised mental state calls into question whether this statement was voluntarily made.

Based on the totality of the circumstances, the post-arrest statement of the Defendant that he may have put Adderall in the bottle" of Caden Thomas, was not voluntarily made. The Defendant has been relying for years on a drug to aid in his mental health and the statement was made as a reaffirmation of a statement that was made in violation of the Defendant's *Miranda* rights. As such, this post-arrest statement must be suppressed from evidence.

The post-arrest incriminating statement in addition to be made involuntarily for purposes of the Fifth and Fourteenth Amendment, was fruit of the poisonous tree. The post-arrest incriminating statement was made as a reaffirmation of the pre-arrest statement which was obtained in violation of the Defendant's *Miranda* rights. The Defendant was simply reaffirming a statement he made previously to the officer under constitutionally deficient conditions and as

such, the statement should be suppressed. But for the un-Mirandized statement, the Defendant would not have made this incriminating statement post-arrest.

S/ David E. Josey
Attorney for Defendant

Applicant Details

First Name	**Kalli**
Middle Initial	**A**
Last Name	**Joslin**
Citizenship Status	**U. S. Citizen**
Email Address	**kaj87@georgetown.edu**
Address	**Address** Street **806 Channing Pl NE, 323** City **Washington** State/Territory **District of Columbia** Zip **20018** Country **United States**
Contact Phone Number	**3214465793**

Applicant Education

BA/BS From	**Rollins College**
Date of BA/BS	**May 2019**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal of Gender and the Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Katskee, Richard
katskee@au.org
202-466-3234
McLeod, Allegra
mcleod@law.georgetown.edu
Francois, Aderson
Aderson.Francois@georgetown.edu
(202) 661-6721

This applicant has certified that all data entered in this profile and any application documents are true and correct.

KALLI JOSLIN
806 Channing Place NE Apt. 323, Washington, DC 20018
kalli.joslin@gmail.com · (321) 446-5793

The Honorable Elizabeth W. Hanes, Magistrate Judge
United States District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am a 3L student at the Georgetown University Law Center and the incoming Editor-in-Chief of the *Georgetown Journal of Gender and the Law*. I would be honored to join your chambers as a law clerk for the 2022-2024 term. I have also greatly enjoyed my visits to Richmond and would love the opportunity to establish stronger roots in the area.

I am extremely interested in federal impact litigation and have used my time in law school to explore that interest through my internships and course work. This past semester, I also served as a student-attorney in the Georgetown Law Civil Rights Clinic, litigating cases in the United States District Courts for the District of Maryland and the Eastern District of Virginia as well as the DC Office of Human Rights on a variety of statutory and constitutional claims. Through this clinic, I was able to develop experience in motions practice, discovery disputes, settlement negotiations, oral advocacy, and brief writing.

My resume, unofficial law school transcript, and writing sample are submitted with this application. Georgetown will submit my recommendations from the following people under separate cover:

1. Aderson François, Georgetown University Law Center
   aderson.francois@georgetown.edu; (917) 686-0055.
2. Allegra McLeod, Georgetown University Law Center
   mcleod@law.georgetown.edu; (415) 867-1810.
3. Richard Katskee, Americans United for Separation of Church and State
   katskee@au.org; (202) 466-7304.

Please let me know if I can provide any additional information. Thank you very much for your consideration.

Respectfully,
Kalli Joslin

KALLI JOSLIN

806 Channing Place NE Apt. 323, Washington, DC 20018
kalli.joslin@gmail.com · (321) 446-5793

EDUCATION

Georgetown University Law Center, Washington, DC
Juris Doctor Expected Spring 2022
- GPA 3.78 (Top 10% Fall 2019; Dean's List Fall 2019 & Fall 2020)
- Journal: Georgetown Journal of Gender and the Law (Editor-in-Chief, Vol. XXIII)
- Activities: ACLU (First Amendment Issue Director), OutLaw (Publicity Chair), Public Interest Fellow

Rollins College, Winter Park, FL
Bachelor of Arts in American Studies and Theatre, Minor in Political Science Spring 2019
- GPA 3.96
- Honors: Omicron Delta Kappa, Fiat Lux Award, Presidential Award for Diversity and Inclusion
- Activities: Student Government Association, Spectrum LGBTQ+ student group

EXPERIENCE

Lambda Legal, Washington, DC
Intern Summer 2021
Participate in strategic coalition calls to address recent legislation in multiple states banning transgender girls from participating in school sports. Produce memo evaluating viability of Affordable Care Act Section 1557 claim on behalf of transgender prisoner denied gender-affirming surgery.

Georgetown Civil Rights Clinic, Washington, DC
Student Attorney Spring 2021
Served as student attorney in three active civil rights cases in DC, Maryland, and Virginia. Prepared for and conducted two depositions as First Chair totaling over 10 hours on the record in employment sex discrimination case against state university. Developed First Amendment Free Exercise and RFRA legal arguments in brief on behalf of transgender student excluded from parochial school. Drafted and revised interrogatories, requests for the production of documents, and responses and objections to similar requests from opposing counsel on behalf of state prisoner with severe diabetes. Attended settlement conference in United States District Court for the Eastern District of Virginia on June 9, 2021. Communicated directly with opposing counsel via email and phone conference. Constructed agendas for weekly meetings with clients and clinic team members. Developed and practiced trauma-informed lawyering skills.

Americans United for Separation of Church and State, Washington, DC
Litigation Intern Summer 2020
Researched and wrote memo addressing major legal arguments in preparation for Supreme Court amicus brief in *Fulton v. City of Philadelphia* supporting right of LGBTQ+ people to participate in city-funded foster care programs. Composed memo analyzing a U.S. Department of Education rule prohibiting public schools from imposing all-comers policies on religious student organizations. Co-hosted virtual Summer Series panel with fellow intern describing negative effects of school vouchers on LGBTQ+ students and students with disabilities. Authored blog post describing role as intern and personal investment in church-state separation.

Neighborhood Legal Services Program, Washington, DC
"Help for the Holidays" Volunteer (pro bono) Winter 2019
Toured DC Landlord & Tenant Court to gain better understanding of obstacles that tenants face. Organized files for 6 cases in DC Superior Court and Office of Administrative Hearings. Drafted comprehensive closing letters for 2 clients based on proceedings spanning over 4 years.

INTERESTS

Watercolor painting, bread baking, and hand embroidery.

Record of: Kalli Anne Joslin
GUID: 806503555

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	002	93	Bargain, Exchange, and Liability	6.00	A	24.00	
			David Super				
LAWJ	005	30	Legal Practice: Writing and Analysis	2.00	IP	0.00	
			Kristen Tiscione				
LAWJ	007	93	Property in Time	4.00	A-	14.68	
			Sherally Munshi				
LAWJ	009	34	Legal Justice Seminar	3.00	A-	11.01	
			Allegra McLeod				

Dean's List Fall 2019

	EHrs	QHrs	QPts	GPA
Current	13.00	13.00	49.69	3.82
Cumulative	13.00	13.00	49.69	3.82

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	001	93	Legal Process and Society	5.00	P	0.00	
			Lawrence Solum				
LAWJ	003	93	Democracy and Coercion	4.00	P	0.00	
			Allegra McLeod				
LAWJ	005	30	Legal Practice: Writing and Analysis	4.00	P	0.00	
			Kristen Tiscione				
LAWJ	008	31	Government Processes	4.00	P	0.00	
			Jonathan Molot				
LAWJ	611	19	Congressional Hearing Simulation	1.00	P	0.00	
			Indivar Dutta-Gupta				

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	18.00	0.00	0.00	0.00
Annual	29.00	13.00	49.69	3.82
Cumulative	31.00	13.00	49.69	3.82

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	165	07	Evidence	4.00	A-	14.68	
			Gerald Fisher				
LAWJ	1675	05	Land, Dispossession, and Displacement Seminar: Topics in Property Law	3.00	A	12.00	
			K-Sue Park				
LAWJ	1722	05	Lawyers as Leaders	1.00	P	0.00	
			William Treanor				
LAWJ	178	05	Federal Courts and the Federal System	3.00	A-	11.01	
			Carlos Vazquez				
LAWJ	215	05	Constitutional Law II: Individual Rights and Liberties	4.00	A	16.00	
			Peter Edelman				

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	15.00	14.00	53.69	3.84
Cumulative	46.00	27.00	103.38	3.83

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	361	97	Professional Responsibility	2.00	P	0.00	
			Deepika Ravi				
LAWJ	528	09	Civil Rights Clinic		NG		
			Aderson Francois				
LAWJ	528	81	~Research & Analysis	4.00	A-	14.68	
			Aderson Francois				
LAWJ	528	82	~Written & Oral Communication	4.00	A-	14.68	
			Aderson Francois				
LAWJ	528	83	~Professionalism & Advocacy	4.00	A-	14.68	
			Aderson Francois				

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	14.00	12.00	44.04	3.67
Annual	29.00	26.00	97.73	3.76
Cumulative	60.00	39.00	147.42	3.78

End of Juris Doctor Record

Americans United
for the Separation of Church and State
1310 L Street, NW, Suite 200
Washington, DC 20005
www.au.org - (202) 466-3234

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Kalli Joslin for a clerkship in your chambers. During the summer of 2020, Ms. Joslin was a spectacular legal intern with Americans United for Separation of Church and State, where I am the Legal Director. She showed herself to be a rigorous as well as creative thinker, a clear writer, and an exceptionally productive member of our legal department, as we were all wrestling with the challenges of COVID-related remote work.

Ms. Joslin completed substantial legal research and writing in her time at Americans United. Most notably, she aided in our preparation of an amicus brief filed in the U.S. Supreme Court in Fulton v. City of Philadelphia, No. 19-123, by producing thoughtful, useful memoranda addressing issues such as public-employee speech rights and the constitutionality of conditions on government-spending programs. Her writing was clear, and her ideas were well-organized, allowing us to draw portions of the legal analysis in the amicus brief directly from her memos.

More generally, Ms. Joslin quickly developed a sophisticated understanding of several complex, evolving areas of First Amendment law. She also came to us with a surprisingly strong background in and aptitude for administrative law. In both areas, she capably teased out finely drawn distinctions among relevant cases. And she was thorough in her research and thoughtful in her application of that research.

Finally, Ms. Joslin was an active, consistently engaged participant in departmental meetings, routinely asking good questions and sharing ideas about, for example, whether to pursue litigation or how to make particular legal arguments most persuasively. Added to her deep commitment to using the law to accomplish good in the world, she was an enthusiastic presence and a pleasure to have in our office. I think that she will be a strong judicial law clerk.

If I can be of further help to you or your staff in the selection process, please don't hesitate to contact me at (202) 466-7304 or katskee@au.org.

Sincerely,

Richard B. Katskee
Vice President and Legal Director

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to offer my strongest possible recommendation to Kalli Joslin, an outstanding Georgetown Law student who is applying for a clerkship in your chambers. Kalli was a student in two of my courses during her first year of law school, including a small jurisprudence seminar, so I have come to know Kalli well. She almost immediately distinguished herself as brilliant, hard-working, passionate about the law and civil rights work, analytically sharp, an excellent writer, and a kind human being. She is one of those young advocates who stands out from the rest right away for her tremendous intellectual gifts, skilled oral advocacy, crisp command of written language, and her graciousness. In short, Kalli is a star and she would be a wonderful addition to your team.

Kalli is exceptionally well prepared to serve as a law clerk following her experiences as the Editor-in-Chief of the Georgetown Journal of Gender and the Law, her work on pending Supreme Court litigation during her summer internship, and her time as a student attorney in the Civil Rights Clinic. She writes beautifully, thinks clearly, is able to manage considerable responsibility and pressure with grace, and she is an astute legal analyst. She would excel in your chambers and I'm confident she would be a pleasure to mentor and teach.

Kalli excelled in my courses in all the conventional ways, performing at the top of the class on her exams, contributing to class discussion at the highest level, and submitting excellent work throughout our year together. In the time since her first year, during the pandemic, Kalli has somehow thrived, taking on a journal leadership role, continuing to dazzle her professors with her stellar performance, and to engage in public interest work through the Civil Rights Clinic and her internships.

In addition to her intellectual gifts, Kalli is a young person with the strength of will and character to excel academically and professionally despite confronting substantial obstacles. Kalli was raised in a conservative Christian family and came out as LGBTQ in college while advocating for equal rights for her community, in response to which she faced rejection from her family. She has managed to maintain those important familial relationships, and maintain her faith, despite significant challenges. During this time, Kalli also led a successful campaign at her undergraduate college to ensure a non-discrimination policy that is LGBTQ+ inclusive. Kalli hopes in the future to work in impact litigation at the intersection of religious freedom and LGBTQ+ rights, an area she is well positioned to engage in light of her personal background.

I cannot imagine any student more qualified and more deserving of the opportunity to work with you as a law clerk. She would give the position all of her formidable energy and talent, and I'm certain she will go on to make you proud. I hope you will consider interviewing Kalli and inviting her to work with and learn from you.

Please do not hesitate to contact me if there is any further information I could provide. Thank you for your time and consideration.

Sincerely,

Allegra M. McLeod, J.D., Ph.D.
Professor of Law
mcleod@law.georgetown.edu
202-661-6596

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 11, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a Professor of Law and Director of the Civil Rights Clinic and Voting Rights Institute at Georgetown University Law Center. It is my pleasure to write this clerkship recommendation letter on behalf of Kalli Joslin.

Kalli served as a student-attorney in the Civil Rights Clinic and Voting Rights Institute during spring and summer 2020. The Civil Rights Clinic litigates on behalf of indigent, prisoner, and pro se clients in federal and state courts on a range of civil rights matters, including but not limited to employment and housing discrimination, police brutality, unconstitutional prison conditions, habeas corpus, and unfair procedural barriers to the courts. The Voting Rights Institute, in partnership with the American Constitution Society and the Campaign Legal Center, litigates voting rights cases nationwide and also conducts trainings for attorneys and experts interested in litigating cases under the Voting Rights Act of 1965. Students in the clinic receive 12 credits for the semester; it is often their only class for the semester and they are expected to treat it as a full time job, devoting a minimum of forty hours a week to clinic work. Over the course of the semester, each student works in small teams of three or four on a number of cases under my supervision and that of the two full-time fellows who are experienced attorneys.
I have described our work at length in order to make clear that my recommendation of Kalli is not based on a lecture or seminar class but rather on a months-long professional working relationship between Kalli, our two supervising fellows, and myself. During her time in the clinic, Kalli worked on a number of projects, including managing all aspects of an employment and unequal pay discrimination action in federal court, preparing for mediation in a 1983 and Eighth Amendment complaint on behalf of an incarcerated person, and responding to a motion to dismiss in a failure to accommodate case before the District of Columbia Office of Human Rights.

Her work in all projects was excellent. One of our supervising attorneys described Kalli's performance as follows:

Kalli was tasked with writing a memo on a novel substantive due process claim and an Americans with Disabilities Act claim on behalf of a state prisoner who underwent a forced amputation. Not only did she complete the assignment early and with enthusiasm, but she exhibited a quick command of the subject matter, and her written work product was cogent and persuasive. Similarly, Kalli demonstrated exceptional foresight and strategic command of the case when drafting discovery requests and interrogatory responses. Kalli vetted expert witnesses and researched a variety of issues, including complex damages questions, and she continued to impress me with her ability to complete tasks quickly and to distill complex assignments into easily digestible work product. Kalli's assignments in the clinic covered a variety of topics, and her skill across multiple areas of law proves her great potential as an attorney and law clerk.

As for me, I worked particularly closely with Kalli on the employment discrimination matter. As team-lead in the case, Kalli was in charge of collecting, reviewing, and organizing over 10,000 pages of documents produced by defendants while producing an equal number on our client's behalf. In addition, Kalli and her team had to prepare and conduct depositions of ten fact and FRCP 30b6 witnesses, totaling nearly fifty hours of depositions. But Kalli did not just manage the team; she herself served as first-chair in taking two of the depositions and spent the entire semester conducting weekly meetings with our client to keep her abreast of progress in the case. Of course, I wholeheartedly agree with the assessment of Kalli's legal talents by the supervising fellow, including the meticulousness of her research, the fluency of her writing, and the creativity of her legal analysis. But for me, what I came to appreciate most about Kalli is the maturity and poise she displayed in all of her interactions, including those with the client and opposing counsel. The bottom line is that in every clinical setting one or two students often prove themselves indispensable to the Clinic. During spring 2021, Kalli was one student without whom the Clinic would not function effectively: her desire to engage in serious study of the law, her willingness to work long and hard at mastering tasks, her openness to collaborate with others toward common goals, her commitment to social justice, her ability to exercise tact and judgment are all attributes she brought to the clinic and which are essential in helping me manage the clinic and complete our work.

I would be delighted to speak by phone about Kalli. For now, suffice it to say that she is one of the best Georgetown has to offer. I

enjoyed having her as a student-colleague and believe she will make a wonderful addition to your chambers.
Sincerely,

Aderson Francois
Professor of Law and Director
Civil Rights Clinic

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WRITING SAMPLE

The attached writing sample is a shortened version of the final paper I submitted for the course "Land, Dispossession, and Displacement Seminar: Topics in Property Law" in Fall 2020. The paper was entitled "The Doorstep of Equality: Interpreting the FHA to Prohibit Sexual Orientation and Gender Identity Discrimination in *Smith v. Avanti* and Beyond." While I did receive a written feedback memo from the professor on an earlier draft of this paper, this paper has not been edited by any other person. I substantially edited this sample for length, including removal of the background information on the paper's central case, *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017). The following facts are relevant:

Tonya and Rachel Smith are a married lesbian couple living in Colorado with their two children. Rachel is also transgender. When they applied to rent a duplex in a suburb of Boulder, CO, they were denied. The landlord, Deepika Avanti, stated in a series of emails to the Smiths that she was concerned about the Smith children's noise level and believed Tonya and Rachel's "unique" relationship would draw negative attention to her and her husband within their community.

I. INTRODUCTION: THE COLORADO QUEER HOUSING LANDSCAPE

Background

Colorado has a complex history with LGBTQ+ rights and housing discrimination. While there are few extensive studies of LGBTQ+ discrimination in the state, anecdotal evidence abounds. Neveah Anderson, a transgender woman of color in Aurora, Colorado, is the programs manager of the local nonprofit It Takes a Village that serves the African-American transgender community. She describes experiencing "double discrimination" because of her race and gender identity when trying to finding a place to live in 2016:

> "Most landlords don't want to rent to trans people—they don't want anything to do with us—because they feel a certain way about it, so when a trans person shows up, they'll claim the place suddenly is no longer available," said Anderson, speaking about her personal experience and that of many of her clients. "Most of the time, [transgender people] stay in hotels or they're hopping from house to house; if they're lucky enough, they can stay with family members."[1]

This discrimination is exacerbated by Colorado's affordable housing shortage and the fact that transgender people often also experience employment discrimination, limiting their ability to save enough money to apply for and secure adequate housing.[2]

In the United States more generally, 22% of LGBTQ+ Americans reported experiencing housing discrimination in a 2017 survey.[3] Nearly half of the estimated 11 million LGBTQ+ adults in the United States live in states without statutory protections against sexual orientation and gender identity discrimination in housing, leaving victims of discrimination with no explicit

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[1] Chandra Thomas Whitfield, *Transgender Coloradans Say Housing Discrimination Persists*, THE COLORADO TRUST (December 12, 2016), https://www.coloradotrust.org/content/story/housing-discrimination-persists-metro-denvers-transgender-community.
[2] *Id.*
[3] *Where We Call Home: LGBT People in Rural America*, MOVEMENT ADVANCEMENT PROJECT 32 (April 2019), https://www.lgbtmap.org/file/lgbt-rural-report.pdf.

legal remedies.[4] Although the LGBTQ+ community in Colorado has reached the Supreme Court twice before (*Romer v. Evans* in 1996 and *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018), LGBTQ+ housing discrimination under the FHA in Colorado or anywhere else in the country has yet to reach the Court.

Thesis and Roadmap

This paper centers around *Smith v. Avanti*, a 2017 case from the Federal District Court of Colorado. Although this case is not binding precedent, it is the first-ever federal case to hold that the FHA's prohibition of sex discrimination can extend to instances of sexual orientation and gender identity discrimination.[5] Through this paper, I argue that the FHA is an important (although limited) tool to provide remedies for victims of LGBTQ+ housing discrimination and eventually ensure equal access to housing for all LGBTQ+ Americans. While the FHA will never eliminate all forms of housing discrimination, it serves as both a strong disincentive for landlords to discriminate and a way for victims of discrimination to obtain remedies and recognition of the dignitary harms they faced. Without it, LGBTQ+ Americans are left with state and local remedies that are either inadequate (like in Anderson's case) or nonexistent (currently, 22 states and five territories lack explicit LGBTQ+-inclusive housing nondiscrimination laws).[6]

There are three main approaches that LGBTQ+ housing advocates can take with regards to the FHA. The first is to present all claims of queer housing discrimination as "sex stereotyping" claims. This approach was successful in *Smith v. Avanti*, but does not clearly

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[4] Kerith J. Conron and Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Non-Discrimination Statutes*, UCLA School of Law Williams Institute 1 (April 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf.
[5] *See* Smith v. Avanti, 249 F. Supp. 3d 1194, 1200 (D. Colo. 2017).
[6] *Nondiscrimination Laws*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/non_discrimination_laws/housing (last visited Dec. 18, 2020). Wisconsin is included in this number because it prohibits discrimination on the basis of sexual orientation, but not gender identity. *Id.*

encompass all forms of sexual orientation and gender identity discrimination (for example, a direct rejection based on the landlord's dislike of LGBTQ+ people). The second is to interpret the FHA's prohibition of sex discrimination to include *all* forms of sexual orientation and gender identity discrimination. While this approach was rejected in *Smith*, it recently won a Supreme Court majority in *Bostock v. Clayton County* (holding that employment sex discrimination under Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity discrimination).[7] Had *Smith* been decided post-*Bostock*, it almost certainly would have fully embraced this interpretation. The third is for Congress to formally amend the FHA to explicitly prohibit sexual orientation and gender identity discrimination in housing. This paper focuses on the first two approaches and ultimately advocates for the second—what I refer to as the inclusive interpretation of the FHA.

I begin the next section with a brief analysis of the FHA and LGBTQ+ housing discrimination throughout the late 20th century. The FHA was enacted in 1968 in response to the Civil Rights Movement and the assassination of Dr. Martin Luther King, Jr., but it did not protect the categories of sex and disability (the two main categories under which plaintiffs have brought successful LGBTQ+ housing discrimination claims) until 1974 and 1988 respectively.[8] I then discuss the holding and significance of *Smith v. Avanti*. Although the court in *Smith* failed to recognize an independent basis for claims of sexual orientation and gender identity discrimination under the FHA,[9] this was the first federal decision to hold that discrimination

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[7] *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1734 (2020).
[8] *See* Tracey McCartney and Sara Pratt, *The Fair Housing Act: 35 Years of Evolution*, FAIR HOUSING 3-4, http://fairhousing.com/include/media/pdf/35years.pdf [https://web.archive.org/web/20101216232015/http://fairhousing.com/include/media/pdf/35years.pdf].
[9] *See Smith*, 249 F. Supp. 3d at 1201.

based on sexual orientation and gender identity can constitute impermissible sex stereotyping under the FHA.[10] I follow with a broader analysis of the post-*Smith* landscape of LGBTQ+ housing discrimination throughout the United States, particularly in conjunction with the recent holding in *Bostock*, and describe the benefits and limitations of the inclusive interpretation of the FHA. I conclude with a brief discussion of additional solutions to the problems of LGBTQ+ housing and homelessness beyond the FHA. Both federal litigation strategies like the Smiths' case and community resources like Anderson's It Takes a Village are necessary to protect victims of LGBTQ+ housing discrimination and work toward a state and country free of such discrimination.

II. THE HISTORY OF THE FHA AND LGBTQ+ HOUSING DISCRIMINATION

For decades, courts declined to read the FHA's prohibition of sex discrimination to include sexual orientation and gender identity discrimination, in large part simply because "gay rights claims were not credible to courts forty years ago."[11] Still, two legal approaches emerged that gave LGBTQ+ people facing housing discrimination some recourse under the FHA. Disability status was added to the FHA's list of protected identities in 1988 at the height of the AIDS crisis, which disproportionately affected queer people.[12] When landlords rejected

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[10] *See* Charlie Brennan, *Judge: Gold Hill Landlord Who Refused Same-Sex Couple Violated Federal, State Law*, BOULDER DAILY CAMERA (April 5, 2017, 3:46 PM), https://www.dailycamera.com/2017/04/05/judge-gold-hill-landlord-who-refused-same-sex-couple-violated-federal-state-law/.
[11] Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 163 (2010) (describing a parallel phenomenon of courts rejecting arguments for same-sex marriage equality under the 14th Amendment's Equal Protection Clause).
[12] *See* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1108 (1989).

LGBTQ+ tenants out of disgust or fear of contracting HIV, those tenants were able to file FHA lawsuits claiming disability discrimination.[13]

A year later, the Supreme Court decided *Price Waterhouse v. Hopkins*, holding that relying on sex stereotypes (such as that "a woman cannot be aggressive, or that she must not be") in employment decisions is a form of sex discrimination under Title VII.[14] Because same-sex couples do not conform to the stereotype that men should only be attracted to women and vise versa, and transgender people often do not conform to the stereotype that people with certain genitalia should dress a certain way, this decision was crucial in the fight for LGBTQ+ equality. And because federal courts interpret the FHA's prohibition of sex discrimination similarly to that of Title VII,[15] queer people facing housing discrimination became able to file FHA complaints of sex stereotyping in housing.

The sex stereotyping argument is still used today for LGBTQ+ discrimination claims, and was the basis for the positive outcome in *Smith v. Avanti*.[16] However, it does not encompass all forms of discrimination that LGBTQ+ people face with regard to housing, and it leaves room for judges to deny relief to LGBTQ+ plaintiffs who fail to situate their discriminatory experiences fully within the framework of sex stereotyping. This is in stark contrast to the more inclusive, textualist interpretation of "sex" endorsed *Bostock v. Clayton County*, which is likely to govern FHA claims going forward.[17]

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[13] *See id.*
[14] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).
[15] *See, e.g.*, Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty.s Project, Inc., 576 U.S. 519, 520 (2015) ("Although the FHA does not reiterate Title VII's exact language, Congress chose words that serve the same purpose and bear the same basic meaning but are consistent with the FHA's structure and objectives.").
[16] *See* discussion *infra* Section III.
[17] *See* discussion *infra* Section IV.

III. *SMITH V. AVANTI* AND THE EMERGENCE OF AN INCLUSIVE FHA

Background and Holding

Lambda Legal filed their complaint on behalf of the Smiths in the Federal District Court for the District of Colorado on January 14, 2016, almost a year after the discrimination had taken place.[18] They alleged five causes of action: sex and familial status discrimination in violation of the FHA, as well as sex, sexual orientation, and familial status discrimination in violation of CADA.[19] In particular regarding the FHA, they alleged that Avanti had violated 42 U.S.C. §3604(a) by intentionally refusing to rent a dwelling to them based on their sex and familial status and 42 U.S.C. §3604(c) by intentionally making a statement with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination based on sex and familial status.[20] Lambda argued that the Smiths had experienced sex discrimination in two ways: through impermissible sex stereotyping (as established in *Price Waterhouse* and its progeny), and directly because of their sexual orientation and gender identity.[21] Their familial status argument rested on Avanti's comments regarding the Smiths' children.[22]

In June 2016, Lambda Legal moved for partial summary judgment on all questions except damages.[23] Avanti failed to file a response, and in April 2017 (two full years after the

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[18] Complaint at 1, Smith v. Avanti, 249 F. Supp. 3d 1194 (D. Colo. 2017) (No. 1:16-CV-00091).
[19] *Id.* at 11-16.
[20] *Id.* at 11.
[21] *Id.* at 11-12.
[22] *Id.* at 13.
[23] Plaintiffs' Unopposed Motion for Partial Summary Judgment, Smith v. Avanti, 249 F. Supp. 3d 1194 (D. Colo. 2017) (No. 1:16-CV-00091).

initial discrimination) Judge Raymond P. Moore of the Colorado district court granted summary judgment to the Smiths.[24]

The court agreed that the Smiths had experienced sex stereotyping in violation of the FHA, finding that Avanti's emailed statements constituted discrimination "against women (like them) for failure to conform to stereotype norms concerning to or with whom a woman should be attracted, should marry, and/or should have children," as well as "discrimination against Rachel because she does not conform to gender norms of a male, *e.g.*, does not act or dress like the stereotypical notions of a male."[25] However, the opinion rejected attempts to "bootstrap" other theories of direct sexual orientation and gender identity discrimination to their sex stereotyping claim and stopped short of finding impermissible sex stereotyping solely because of Rachel's transgender identity or because of the Smiths' sexual orientations.[26] This is in large part because the Tenth Circuit "has explicitly declined to extend Title VII protections to discrimination based on a person's sexual orientation" or transgender identity.[27]

The court granted the Smiths' FHA familial status claims because Avanti "clearly stated, in writing, that she preferred to have a couple without children living in the Townhouse."[28] The court also granted the Smiths' CADA sex and familial status discrimination claims for virtually identical reasons, and found that they had experienced sexual orientation discrimination directly within the meaning of CADA.[29]

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[24] *Smith*, 249 F. Supp. 3d at 1197.
[25] *Id.* at 1200-01.
[26] *Id.* at 1201.
[27] *Id.* at 1200.
[28] *Id.* at 1201.
[29] *Id.* at 1202-03.

After the motion for summary judgment was granted, the Smiths settled with Avanti and moved to dismiss the case.[30] The settlement agreement required Avanti to pay damages, adopt a nondiscrimination policy, and receive unspecified training.[31] In an interview with the Smiths after the decision was announced, Tonya said: "It's exciting and it's also humbling to be part of something that is bigger than we are. And, to be able to give something back to the LGBT community that has been like a family for us and to ensure that others will have protections now in place."[32] Speaking more broadly, Tonya said: "When it's in your head that people might potentially think differently of you because of the way you live your life you always wonder a little bit."[33] At the time of the decision, the Smiths were living in their friends' basement apartment in Aurora.[34]

Significance

Because Avanti did not appeal the decision, this case is not binding precedent in any federal or state court. However, this decision was the first time that a federal court held that sex discrimination under the FHA can include gender identity and sexual orientation discrimination.[35] Bolstered by the *Bostock* holding discussed *infra* Section IV, arguments for this inclusive interpretation of the FHA are much more likely to succeed in future cases.

Karen Loewy, one of the attorneys at Lambda Legal representing the Smiths, described the victory as "a critical piece of the movement in the courts toward recognizing that the

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[30] *Smith v. Avanti*, LAMBDA LEGAL, https://www.lambdalegal.org/in-court/cases/co_smith-v-avanti (last visited Dec. 18, 2020).
[31] *Id.*
[32] Brennan, *supra* note 10.
[33] Rick Sallinger, *Judge: Landlord Violated Housing Act In Denial Of LGBT Couple*, CBS DENVER (Apr. 16, 2017, 7:22 PM), https://denver.cbslocal.com/2017/04/06/judge-landlord-violated-housing-act-in-denial-of-lgbt-couple/.
[34] Brennan, *supra* note 10.
[35] *Id.*

discrimination LGBTQ people face is a form of sex discrimination under federal antidiscrimination laws," especially because "[t]hese kinds of situations happen all the time, particularly for transgender people, and there's often so little done about it."[36] Theorizing about how the case may have been different if it had been decided post-*Bostock*, Loewy said: "Though the result would be the same . . . it's likely the analysis would now look quite different."[37] She noted that she looks forward to creating and seeing further precedent "recognizing that the housing discrimination and harassment that LGBTQ people face is clearly a form of sex discrimination prohibited by the Fair Housing Act."[38]

IV. THE FUTURE OF THE FHA AND LGBTQ+ HOUSING DISCRIMINATION

Developments since *Smith v. Avanti*

The most important legal development in the area of LGBTQ+ rights since *Smith v. Avanti* is the 2020 decision in *Bostock v. Clayton County*, in which the Supreme Court held that employment sex discrimination under Title VII includes discrimination on the basis of sexual orientation and gender identity.[39] Resting on a textualist interpretation of the statutory language, the holding states that "[w]hen an employer fires an employee for being homosexual or transgender, it necessarily intentionally discriminates against that individual in part because of sex."[40] This interpretation goes further than the *Smith* holding because it does not limit plaintiffs to sex-stereotyping arguments; now, the plaintiffs in Title VII employment discrimination cases

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[36] E-mail from Karen Loewy, Senior Counsel and Seniors Strategist, Lambda Legal, to Kalli Joslin, Student, Georgetown University Law Center (Dec. 17, 2020, 11:01 PM EST) (on file with author).
[37] *Id.*
[38] *Id.*
[39] Bostock v. Clayton County, 140 S. Ct. 1731, 1734 (2020).
[40] *Id.*

can claim that they were directly discriminated against because of their sexual orientation and/or gender identity in violation of federal law.

Justice Alito penned a lengthy dissent in *Bostock* in which he noted that a decision in favor of the inclusive interpretation of "sex" would affect not only future Title VII complaints, but complaints under any of the 100+ federal statutes that use identical language.[41] He proceeded to list those statutes in an appendix, including the FHA among them.[42]

The *Bostock* decision is already having a real effect on the legal housing landscape. The Eighth Circuit Court of Appeals reversed and remanded *Walsh v. Friendship Village* in light of *Bostock* on July 2, 2020.[43] In that case, the Eastern District of Missouri below held that a legally married lesbian couple could not claim sex discrimination in violation of the FHA after their application to a senior living community was denied on the basis of their relationship.[44] The *Michigan Real Property Review* published an article shortly after the *Bostock* decision noting that "real property and real estate law practitioners would be remiss if they failed to acknowledge this decision in their practice."[45] The author suggests that *Bostock* "closes [the] gap" between *Smith*'s sex-stereotyping argument and the inclusive interpretation of "sex" in federal nondiscrimination statutes like the FHA.[46]

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[41] *Id.* at 1778 (Alito, J., dissenting).
[42] *Id.* at 1795 (Alito, J., dissenting).
[43] Walsh v. Friendship Village, No. 19-1395, 2020 WL 5361010, at *1 (8th Cir. July 2, 2020).
[44] Walsh v. Friendship Village, 352 F. Supp. 3d 920, 926-28 (E.D. Mo. 2019), *vacated*, 2020 WL 5361010 (8th Cir. July 2, 2020).
[45] Kayleigh B. Long, *The Evolving Landscape of Housing Sex Discrimination Claims*, 47 MICH. REAL PROP. REV. 19, 20 (2020).
[46] *Id.* at 24.

The benefits and limitations of the inclusive interpretation

After *Bostock*, interpreting the FHA to prohibit housing discrimination on the basis of sexual orientation and gender identity seems virtually unavoidable. Large corporate landlords often receive guidance on FHA compliance to avoid burdensome lawsuits;[47] adding sexual orientation and gender identity to the list of protected identities in this guidance would be a small change with a potentially-massive impact for thousands of LGBTQ+ tenants.

At the personal level, the inclusive interpretation means that the grave dignitary harms that the Smiths and other victims of housing discrimination experienced can be redressed to some extent through litigation and judicial recognition of that harm. Tonya described telling their older son about the case by saying:

> I wanted to instill in him a concept that people deserve to have equal rights and equal access as far as housing goes, and the reason that we took these steps was for that purpose — that we were standing up for what is right. And it's important to stand up for what is right and for people who can't stand up for themselves.[48]

These dignitary benefits are significant, if difficult to quantify. Furthermore, the inclusive interpretation has few (if any) direct negative effects; it is unlikely to overburden the courts because federal courts are already open to existing FHA claims and similar Title VII claims that now include sexual orientation and gender identity discrimination.

However, the inclusive interpretation is far from a quick fix for the larger institutional and systemic issues that result in LGBTQ+ housing discrimination and disproportionate rates of homelessness. Civil litigation is a slow-moving process for addressing wrongs; the Smiths

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[47] *See, e.g.*, Greg Brown, *Guidance on Key Fair Housing Issues,* NATIONAL APARTMENT ASSOCIATION (December 2016), https://www.naahq.org/news-publications/units/december-2016/article/guidance-key-fair-housing-issues; *Fair Housing Act: What It Means to You*, REAL PROPERTY MANAGEMENT, https://www.realpropertymgt.com/landlord-center/fair-housing-act/ (last visited Dec. 18, 2020).
[48] Brennan, *supra* note 10.

waited two full years before receiving their decision. Cases with long discovery periods or appeals can take even longer. Additionally, even the remedies in successful FHA lawsuits are limited. If the court finds a landlord has discriminated, that landlord can be ordered to rent the property in question, pay actual and punitive monetary damages and attorney's fees, and/or be subject to periodic review of documents and practices for a certain number of years.[49] None of these remedies eliminate the difficulty of facing housing insecurity for the months or years between the initial discrimination and the legal resolution. Because of these hurdles, relatively few plaintiffs are willing and able to bring FHA lawsuits, even if they have strong claims. "This is understandable," said Karen Loewy, because "when you're denied housing, your priority is to get a roof over your head, not make a federal case out of having been denied in the first place."[50]

Perhaps most insidiously, the most prevalent form of queer housing discrimination researchers observed in a 2013 HUD-sponsored study was a failure to respond to emailed housing inquiries.[51] The study found that "same-sex couples are significantly less likely than heterosexual couples to get favorable responses to e-mail inquiries about electronically advertised rental housing."[52] Surprisingly, results in states with laws preventing queer housing discrimination showed slightly *worse* treatment for same-sex couples than states without such laws.[53] The study hypothesized that these results could be explained by "potentially low levels of

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[49] *Fair Housing Act*, AMERICAN BAR ASSOCIATION (Sept. 23, 2016), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/everydaylaw0/real_estate/renting_a_home/fair_housing_act/#where.
[50] Loewy, *supra* note 36.
[51] *See* Samantha Friedman et al., *An Estimate of Housing Discrimination Against Same Sex Couples*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT vi (June 2013), https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf.
[52] *Id.*
[53] *Id.*

enforcement, housing provider unfamiliarity with state-level protections, or the possibility that protections exist in states with the greatest need for them."[54]

This study exposes two weaknesses of the inclusive interpretation of the FHA and similar state nondiscrimination laws that provide remedies for victims of housing discrimination. First, it makes clear that state nondiscrimination laws do not prevent landlords from discriminating against prospective LGBTQ+ renters. Second, a failure to reply to an email is likely not actionable under either federal or state law unless the plaintiff can affirmatively show that the failure to respond was because of their sexual orientation or gender identity. *Smith v. Avanti* was an extreme outlier because of how blatant Avanti was about her discriminatory reasons for refusing the Smiths, which she documented in multiple emails. Because a failure to reply to an email can be easily explained, and there are very rarely records showing that such failure was discriminatorily motivated, these cases are not likely to win, if they even go to trial. The likelihood of a case like this making its way to the Supreme Court and establishing binding precedent across the nation is even slimmer.

V. CONCLUSION

Even before *Smith* and *Bostock*, queer Coloradans found ways to live and love together. Relatively recent legal protections at the city and eventually state level have undoubtedly contributed to their ability to feel secure in their right to nondiscriminatory housing. However, LGBTQ+ people in other states have not been so fortunate—only 22 states and Washington, D.C. have laws like Colorado's with language prohibiting discrimination based on sexual orientation

[54] *Id.* at vii.

and gender identity in housing.[55] Even those fortunate enough to live in states or cities with legal protections may not be able to afford adequate housing due to the inflated housing costs in those areas.[56]

In the Smiths' case, losing on their FHA claims likely would not have made much difference, because they were already protected by CADA's inclusive provisions. However, for the thousands of LGBTQ+ tenants and homebuyers in the 21 states and 5 territories with no statewide protections whatsoever,[57] claiming a violation of the FHA is likely their only avenue for relief if they experience housing discrimination on the basis of their sexual orientation or gender identity. The inclusive interpretation of the FHA is thus a relatively small but vital step in the fight for housing equality across America.

Beyond a more inclusive interpretation of the law, enforcement is key. "You can pass all the laws in the world," said Karen Scarpella, executive director of a Denver nonprofit transgender advocacy organization, "but if they're not enforced, people will just find loopholes. What difference is it really making?"[58] Many more LGBTQ+ Americans are likely to face housing discrimination before the Supreme Court rules on a claim of queer housing discrimination under the FHA or Congress passes the Equality Act, and many will still experience discrimination even after the law explicitly includes them. Other measures are necessary alongside the FHA and lawsuits like the Smiths' to ensure true housing equality for LGBTQ+ people, including but not limited to: community initiatives like It Takes a Village,

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[55] *Nondiscrimination Laws*, *supra* note 6.
[56] *See* Manny Garcia, *LGBT Home Buyers May Be Priced Out of Areas With Legal Protections From Discrimination*, ZILLOW (June 16, 2020), https://www.zillow.com/research/lgbt-home-buyer-price-premium-27295/#:~:text=Manny%20Garcia%20on%20%2F-,LGBT%20Home%20Buyers%20May%20Be%20Priced%20Out,With%20Legal%20Protections%20From.
[57] *Nondiscrimination Laws*, *supra* note 6.
[58] Whitfield, *supra* note 1.

expanded shelter access and services (particularly for transgender youth and adults of color, who are at a higher risk of homelessness, domestic violence, and assault),[59] expanded access to housing grants and loans, the LandBack movement for Native American LGBTQ+ people who have faced generations of displacement,[60] legal protections for sex workers, proper enforcement of the employment nondiscrimination guaranteed in *Bostock*, and continuing cultural change toward acceptance of LGBTQ+ people. These parallel fights for equality will take place in courts, in legislatures, in classrooms, in homes, on streets, and online, now and in the years to come.

[59] *See Violence Against Trans and Non-Binary People*, VAWNET, https://vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and (last visited Dec. 18, 2020).
[60] *See* Katherine Davis-Young, *For many Native Americans, embracing LGBT members is a return to the past*, WASHINGTON POST (Mar. 29, 2019, 1:48 PM), https://www.washingtonpost.com/national/for-many-native-americans-embracing-lgbt-members-is-a-return-to-the-past/2019/03/29/24d1e6c6-4f2c-11e9-88a1-ed346f0ec94f_story.html; *Land Back: A Yellowhead Institute Red Paper*, YELLOWHEAD INSTITUTE 6 (October 2019), https://redpaper.yellowheadinstitute.org/wp-content/uploads/2019/10/red-paper-report-final.pdf.

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Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Garnett, Nicole
Nicole.Garnett.5@nd.edu
574-631-3091
Root, Veronica
veronica.s.root.5@nd.edu
574-631-4766
Mills, Thomas
tmills@nd.edu
(574) 631-5916

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Caitlin-Jean A. Juricic
3111 Miami Trail
Michigan City, IN 46360
cjuricic@nd.edu • (219) 242-5283

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Robinson and Merhige Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a graduating law student at Notre Dame Law School and the Executive Editor of the Notre Dame *Journal of Legislation*. Please accept this letter as my clerkship application for your chambers. I am interested in clerking specifically for you not only because your personal and professional background aligns with my personal and professional interests (for instance, community volunteerism and nonprofit experience, as well as working on legal compliance issues and consumer protections), but also because I seek to clerk for a judge who will challenge my capabilities as a lawyer and who can help me grow as a member of the legal profession. Importantly, I believe that time in your chambers will afford me an invaluable experience as I pursue a career in government service.

During my time in law school, I have developed a strong desire for intellectually stimulating and demanding work. For example, my time as a law school research assistant has challenged me to quickly grasp new areas of law and to write in a comprehensive yet concise manner. The work and demands of this position initially drove me to seek out a clerkship upon recognizing that a clerkship would only help enhance my knowledge and mastery of the law. My desire to clerk also stems from my past and current experiences with the U.S. House of Representatives Committee on the Judiciary and the U.S. House of Representatives Committee on Oversight and Reform, working alongside many elite attorneys, all of whom attributed their advanced writing and research abilities to their time clerking in chambers. Beyond becoming a better attorney, I also believe that I will learn a great deal from you about how to both navigate the legal profession as a female government lawyer given your own experience as a federal public defender, as well as use my degree for the public good, as evidence by your time with AmeriCorps and developing your own non-profit.

I have attached my résumé, transcript, a list of references, and a writing sample for your review. The writing sample is my forthcoming Note set to be published in the *Notre Dame Journal of Law, Ethics, & Public Policy* this spring. In the Note, I examine the use of executive order ethics pledges as mechanisms to address the political revolving door and how to promote government accountability within the executive branch. I then offer several recommendations to confront the shortcomings that emerged from recent executive order ethics pledges over the last three decades.

Thank you for considering my application. Please do not hesitate to contact me if I can provide you with any additional information.

Respectfully,

Caitlin-Jean A. Juricic

CAITLIN-JEAN A. JURICIC
(219) 242-5283 • cjuricic@nd.edu
3111 Miami Trail, Michigan City, IN 46360

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate | Cum Laude — May 2022
GPA: 3.497

- Notre Dame Journal on Legislation – *Executive Editor*
- Faculty Award Spring 2021: Advanced Legal Research - *Highest Grade in Seminar*
- Notre Dame Law School Program on Ethics, Compliance, and Inclusion – *Inaugural Student Fellow*
- Publications
  - *Toward More Robust Self-Regulation Within the Legal Profession*, _ WASH. UNIV. J.L. & POL'Y _ (forthcoming 2022) (coauthor with Veronica Root Martinez)
  - *A Temporary Stopper in the Revolving Door: Executive Order Ethics Pledges and Their Role in Promoting Government Accountability and Integrity Within the President's Branch*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y _ (forthcoming 2022)

Sewanee: The University of the South — Sewanee, TN
Bachelor of Arts in Political Science with Minors in History and International Global Studies — May 2014

- Order of the Gown (*academic honor*); Volunteer of the Year Award; Community Builder Award; AmeriCorps Service Award; Bonnor Scholar; NCAA Div. III Lacrosse 2010–2013; NCAA Conference Character & Community Award

EXPERIENCE

U.S. House of Representatives – Oversight and Reform Committee — Washington, DC
Law Clerk — January 2022 – April 2022

- Researched, drafted, and edited legal memoranda and investigation materials on federal voting rights and election law, civil rights of incarcerated persons, environmental policy, and conflicts in federal and state immigration policy
- Drafted document requests and investigation letters to federal and state agencies, as well as private sector companies
- Drafted committee hearing memoranda, member questions and rebuttal lines, and remarks for the committee chair

U.S. House of Representatives – Judiciary Committee — Washington, DC
Law Clerk — May 2021 – August 2021

- Researched, drafted, and edited legislation addressing workplace rights within the federal judiciary
- Researched and drafted memoranda regarding counterfeit online products, domestic and international patent laws relevant to COVID-19 vaccines, the CDC COVID-19 eviction moratorium, and federal judicial diversity
- Researched and drafted legal and constitutional challenges to proposed legislation and recommendations for how to defeat legal challenges

Notre Dame Law School, Professor Veronica Root Martinez — South Bend, IN
Research Assistant — May 2020 – Present

- Draft memoranda on court-appointed monitors, government ethics, and corporate compliance mechanisms
- Research, draft, and edit scholarship on (i) corporate compliance enforcement, (ii) corporate monitorships, (iii) federal judicial misconduct, and (iv) government ethics

NCTA: The Internet & Television Association — Washington, DC
Legal & Regulatory Policy Researcher — July 2016 – July 2019

- Drafted research memoranda, presentations, and analyses on changes in the telecommunications industry
- Monitored and reported on congressional and government regulatory developments affecting member companies' business practices surrounding privacy, cybersecurity, rural broadband access, and internet regulations

Harris, Wiltshire & Grannis LLP — Washington, DC
Legal Analyst — June 2014 – June 2016

- Revised and cite-checked legal briefs, federal agency filings, policy initiatives, and regulatory memorandum
- Monitored federal legislation and agency developments at the FCC and FTC regarding telecommunications law

VOLUNTEERISM AND COMMUNITY WORK

- **Washington D.C. Rape Crisis Center** – Crisis Intervention Advocate
- **"Ask Not" Campaign** (*community development org.*) – Founder; *Up & Coming Organization* Award - Sewanee, TN

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UNIVERSITY OF NOTRE DAME — NOTRE DAME, INDIANA 46556

Juricic, Caitlin-Jean Anne
Student ID: XXXXX0796

Date Issued: 21-JAN-2022
Page: 1

Birth Date: 04-19-XXXX

Issued To: Caitlin-Jean A. Juricic
Parchment DocumentID: 37602021
cjuricic@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	UND SEMESTER TOTALS EARNED HRS	UND SEMESTER TOTALS GPA HRS	UND SEMESTER TOTALS GPA	OVERALL TOTALS ATTEMP HRS	OVERALL TOTALS EARNED HRS	OVERALL TOTALS GPA HRS	OVERALL TOTALS GPA
UNIVERSITY OF NOTRE DAME CREDIT:												
Fall Semester 2019												
Law School												
LAW 60105	Contracts	4.000	A	16.000								
LAW 60308	Civil Procedure	4.000	B	12.000								
LAW 60703	Legal Research	1.000	B	3.000								
LAW 60705	Legal Writing I	2.000	B+	6.666								
LAW 60901	Torts	4.000	B	12.000								
-		Total		49.666	15.000	15.000	15.000	3.311	15.000	15.000	15.000	3.311
Spring Semester 2020												
During the Spring 2020 semester, a global health emergency required significant changes to coursework. Unusual enrollment patterns and grades reflect the tumult of the time.												
Law School												
LAW 60302	Criminal Law	4.000	P	0.000								
LAW 60307	Constitutional Law	4.000	P	0.000								
LAW 60707	Legal Resrch & Writing II-MC	1.000	B+	3.333								
LAW 60906	Property	4.000	P	0.000								
LAW 70507	Trusts and Estates	3.000	P	0.000								
LAW 75700	Galilee	1.000	S	0.000								
-		Total		3.333	17.000	17.000	1.000	3.333	32.000	32.000	16.000	3.312

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME **NOTRE DAME, INDIANA 46556**

Juricic, Caitlin-Jean Anne
Student ID: XXXXX0796

Date Issued: 21-JAN-2022
Page: 2

Birth Date: 04-19-XXXX

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	UND SEMESTER TOTALS EARNED HRS	UND SEMESTER TOTALS GPA HRS	UND SEMESTER TOTALS GPA	OVERALL TOTALS ATTEMP HRS	OVERALL TOTALS EARNED HRS	OVERALL TOTALS GPA HRS	OVERALL TOTALS GPA
University of Notre Dame Information continued:												
Fall Semester 2020												
Law School												
LAW 70203	Remedies	3.000	B	9.000								
LAW 70211	Advanced Legal Research: Federal	2.000	A-	7.334								
LAW 70313	Law of Education	3.000	A-	11.001								
LAW 70360	Civil Rights Law	3.000	B+	9.999								
LAW 73320	Gender Issues and International Law	3.000	A-	11.001								
LAW 75753	Journal of Legislation	1.000	S	0.000								
	Total			48.335	15.000	15.000	14.000	3.453	47.000	47.000	30.000	3.378
Spring Semester 2021												
Law School												
LAW 70215	Advanced Legal Research: Online Legal Research	1.000	A	4.000								
LAW 70355	Employment Discrimination Law	3.000	A-	11.001								
LAW 70840	Economic, Social and Cultural Rights	3.000	P	0.000								
LAW 70919	Building an Anti-Racist Vocabulary	1.000	S	0.000								
LAW 73373	Comparative Federalism	3.000	A	12.000								
LAW 75753	Journal of Legislation	1.000	S	0.000								
LAW 76101	Directed Readings	2.000	A	8.000								
Good Standing		Total		35.001	14.000	14.000	9.000	3.889	61.000	61.000	39.000	3.496
Fall Semester 2021												
Law School												
LAW 70353	Labor and Employment Law	2.000	A-	7.334								
LAW 70807	Professional Responsibility	3.000	A-	11.001								
LAW 70812	Jurisprudence	3.000	B	9.000								
LAW 70919	Building an Anti-Racist Vocab	1.000	S	0.000								
LAW 73311	Judicial Process Seminar	2.000	A-	7.334								
LAW 73837	The Judicial Role in American History	2.000	A-	7.334								
LAW 75753	Journal of Legislation	1.000	S	0.000								
Good Standing		Total		42.003	14.000	14.000	12.000	3.500	75.000	75.000	51.000	3.497

CONTINUED ON PAGE 3

UNIVERSITY OF NOTRE DAME **NOTRE DAME, INDIANA 46556**

Juricic, Caitlin-Jean Anne
Student ID: XXXXX0796

Date Issued: 21-JAN-2022
Page: 3

Birth Date: 04-19-XXXX

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	UND SEMESTER TOTALS EARNED HRS	UND SEMESTER TOTALS GPA HRS	UND SEMESTER TOTALS GPA	OVERALL TOTALS ATTEMP HRS	OVERALL TOTALS EARNED HRS	OVERALL TOTALS GPA HRS	OVERALL TOTALS GPA
Spring Semester 2022												
IN PROGRESS WORK												
LAW 73761 LW ND	Law in DC Seminar	2.000	IN PROGRESS									
LAW 75753 M	Journal of Legislation	1.000	IN PROGRESS									
LAW 75761 LW ND	Law in DC Field Pl/Ext	8.000	IN PROGRESS									
LAW 76101 M	Directed Readings	2.000	IN PROGRESS									
	In Progress Credits	13.000										
********** TRANSCRIPT TOTALS **********												
NOTRE DAME	Ehrs:	75.000	QPts:	178.338								
	GPA-Hrs:	51.000	GPA:	3.497								
TRANSFER	Ehrs:	0.000	QPts:	0.000								
	GPA-Hrs:	0.000	GPA:	0.000								
OVERALL	Ehrs:	75.000	QPts:	178.338								
	GPA-Hrs:	51.000	GPA:	3.497								
********** END OF TRANSCRIPT **********												

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.
The most frequently used codes are:

AF	Angers, France
DC	Washington, DC
FA	Fremantle, Australia
IA	Innsbruck, Austria
IR	Dublin, Ireland
LA	London, England (Fall/Spring)
LE	London, England (Law-JD)
LG	London, England (Summer EG)
LS	London, England (Summer AL)
PA	Perth, Australia
PM	Puebla, Mexico
RE	Rome, Italy
RI	Rome, Italy (Architecture)
SC	Santiago, Chile
SP	Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
http://registrar.nd.edu/students/gradefinal.php

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S	Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V	Auditor (Graduate students only).
W	Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P	Pass in a course taken on a pass-fail basis.
NR	Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC	No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED

CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:
http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

NOTRE DAME LAW SCHOOL
1100 Eck Hall of Law
Notre Dame, Indiana 46556

May 10, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Caitlin-Jean Juricic

Dear Judge Hanes:

Caitlin-Jean Juricic (who also goes by "CJ") has asked me to recommend her for a clerkship. CJ is a third year student with a strong academic record at Notre Dame Law School, where I teach.

CJ has been a student in two of my classes, first year Property and an upper-level seminar on the Law of Education. She was enrolled in Property during the semester when Notre Dame, like all law schools, was forced to send our students home and finish the term online. She opted, as did many of her classmates, to take her classes pass-fail that semester. She received a passing grade on the exam. In Law of Education, which she took during the first semester of her second year, she received an A-. In the course, I permit students to write either three short or one long research papers. She wrote three papers, all of which were well written and researched at an appropriate level of detail for assignment. (I do not require full blown research papers from students who opt to write short papers.) I am confident, based upon my evaluation of these papers, that CJ is more than capable of doing the research and writing required of a judicial law clerk.

At Notre Dame Law School, CJ is the executive editor of the Notre Dame Journal on Legislation and is publishing a paper with my colleague, Veronica Root Martinez. CJ worked as Professor Martinez's research assistant following her first year, and I know that Veronica thinks very highly of her. I also note that her grades have improved steadily since her first semester in law school, suggesting that she has hit her stride academically.

I would be happy to discuss CJ's application with you further. I am available by cell at (574) 261-0628 and email at ngarnett@nd.edu.

Sincerely,

Nicole Stelle Garnett
John P. Murphy Professor of Law

Notre Dame Law School
P. O. Box 780
Notre Dame, IN 46556

May 09, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to recommend Caitlin-Jean ("CJ") Juricic to serve as a law clerk in your chambers. CJ is one of the most impressive law students I have had the privilege of working with in my nine years at Notre Dame Law School ("NDLS"). She is brilliant, hard-working, and focused. I am confident that she will excel as a law clerk.

CJ was in my Contracts course during her first year in law school. She stood out from the very beginning. She is bright, inquisitive, and she participated well during class. That is to mean, she participated when she would move the conversation forward, she asked questions that were relevant and appropriate, but she did not grandstand or show-off. She was a genuine delight to teach, as she was always prepared and engaged in the learning exercise. CJ received an "A" in the Contracts course.

During the summer, CJ worked as my research assistant. CJ's work product was nothing short of fantastic. She has naturally good instincts and judgment. She is a fastidious researcher. She is an excellent writer. She took direction well, but she was also able to work independently with little supervision. In short, she was a tremendous help on multiple projects. She is, by far, the best research assistant I have had the pleasure to work with during my career thus far.

During CJ's second-year, she participated in a group directed reading that was run in conjunction with a symposium I was co-hosting on The Ethics of Government Service. CJ attended workshops given by faculty and provided excellent comments on the professors' work. Indeed, a colleague at another school commented on how well CJ had critiqued his own project. Students participating in the group directed reading were required to draft their own projects. CJ proposed a topic, and she then completed an excellent writing project with minimal supervision from myself. Between her work as a research assistant and her participation in the group directed reading, I have become convinced that she should pursue a career in legal academia. She, unfortunately, remains unconvinced!

CJ has continued to serve as a research assistant for me during her second and, now, third-year of law school. She has helped me with a variety of projects, and I trust her implicitly. She has, at times, turned things around for me on what were, objectively, an unreasonable timeline. She did this even as she remained focused on her schoolwork and journal obligations. CJ has talent, grit, focus, and a true passion for the law. She will be an excellent law clerk.

Unlike most law students at Notre Dame, CJ came into law school with prior work experience. That experience has grounded her in a way that has been very positive. She had the presence of mind to know that she did not want to pursue opportunities in "Big Law," so she did not even attempt that process. Instead, she stayed focused on her long-term goals of contributing to work related to public policy and the betterment of society.

Finally, CJ wants to clerk because she is genuinely interested in the law and the adjudication process. She wants to sharpen her skills as an attorney while learning from an experienced jurist. She is not motivated by perceptions of prestige, but instead by her innate desire to learn the profession she is joining to the fullest extent she can. Because CJ is the first person in her family to attend law school and the first person in her family to pursue employment in a professional setting, she does not have familial networks to rely upon as she enters the practice of law. As such, she understands the importance of taking a proactive effort in building a network of mentors for herself. I believe a clerkship will provide yet another positive opportunity for CJ to build the network of mentors that will help her navigate a career within the legal profession.

For the above, and many other, reasons, I enthusiastically recommend CJ to serve as a law clerk in your chambers. Please do not hesitate to contact me if you would like to discuss her application further.

All the best,

Veronica Root Martinez

Veronica Root - veronica.s.root.5@nd.edu - 574-631-4766

I am writing in support of Caitlin-Jean ("CJ") Juricic's application for a judicial clerk position in your chambers. CJ was a student in my Online Legal Research class during the spring semester of 2021. The course is a small (16 students) advanced legal research seminar focused on legal research strategies and free online legal resources. I created the course in response to law students' over-reliance on Westlaw and Lexis, and their inability to effectively and efficiently search, use, and evaluate free legal resources on the Internet.

CJ earned the Faculty Award for Excellence in my class. I was impressed with CJ's attention to detail from the time I graded her first assignment. For each of the assignments in my class, students are required to submit a detailed narrative of their research that explains each step in their process. CJ's assignments were organized and well written, demonstrating her mastery of the course content. In class, CJ actively participated in discussions and asked thoughtful, high-order questions that improved the course for her fellow students. Her questions and comments also highlighted her excellent critical thinking and communication skills.

On the final assignment for the course, CJ earned a perfect score, a grade I have never given to a student before. The assignment focused on the European Union and its website, www.europa.org., and required students create a ten-page research guide on the EU that demonstrated what they learned over the semester about online legal research on a topic of which they had little or no knowledge. CJ's paper was of such a high quality I could have used it for a grading template for the other students' papers. It was also another example of her intelligence and strong work ethic.

Spring 2021 classes at Notre Dame Law School were held in person, so I got to know CJ on a more personal level as we discussed her career goals and future plans. Although she can be a little reserved, CJ is very personable and has a subtle sense of humor. I am confident that CJ will be an exceptional law clerk and a tremendous resource in your chambers. She has proven that she is well equipped to analyze and answer the most challenging and complex of legal questions. Thus, I highly recommend her for a clerkship position without reservation.

Sincerely,

Thomas W. Mills
Associate Dean
Director of the Kresge Law Library and Information Technology

CAITLIN-JEAN A. JURICIC
(219) 242-5283 • cjuricic@nd.edu
3111 Miami Trail, Michigan City, IN 46360

WRITING SAMPLE

The following writing sample is my Note that will be published in the *Notre Dame Journal of Law, Ethics, and Public Policy* in Spring of 2022.

The Note examines various issues surrounding the political revolving door within the executive branch and legal solutions that have been implemented to address this problem. The purpose of the Note is to examine the use of presidential executive order ethics pledges as supplemental tools to confront several shortcomings with the current statutory and regulatory legal regime governing ethical requirements for executive branch officials. The Note briefly discussed the general issue of the revolving door and current legal obligations, and then analyzed the additional obligations placed on executive branch officials under the Clinton, Obama, Trump, and Biden administrations' ethics pledges and assessed the extent to which these pledges successfully—or unsuccessfully—achieved their goal in imposing stricter legal obligations to promote government accountability and ethics. The thesis of the Note puts forth various recommendations to address the deficiencies in executing and enforcing executive order ethics pledges, arguing that in drafting executive order ethics pledges, presidents and their administrations should (i) eliminate—or reformulate—waiver provisions that currently allow for discretionary ethics enforcement, and (ii) include legal safeguards to prevent officials from escaping ethics obligations should a president decide to revoke his executive order ethics pledge. The work is wholly mine and not edited by another.

I. BACKGROUND

* * * * * * * * * * * * *

A. Debates and Issues Behind Revolving Door Restrictions

Like any problem, the revolving door has the potential to produce benefits and detriments for both the government and society at large. Consequently, a divide has evolved between those opposing tough restrictions and those advocating in their favor. Opponents of tough restrictions often argue that strict ethics obligations have negative implications for the government by creating a loss of particularized expertise that is necessary for effective governance.[1] Per this argument, lobbyists are "expert technician[s] . . . capable of explaining complex and difficult subjects in a clear, understandable fashion," and therefore, serve a "very useful purpose . . . and important role" in

1. *See generally* James S. Roberts Jr., *The Revolving Door: Issues Related to the Hiring of Former Federal Government Employees*, 43 ALA. L. REV. 343, 343–44 (1992).

helping administrations advance their policies.[2] By preventing lobbyists with specialized knowledge from working in government on issues they are familiar with, the government thus becomes disadvantaged by having to recruit from a smaller, less-qualified applicant pool which may ultimately result in an absence of policy experts serving within the government.

A second argument put forth by opponents is that post-employment lobbying bans disincentivize individuals from ever entering public service if they know that doing so—even if for a limited tenure—will jeopardize their ability to find private sector employment once they leave their government post.[3] Indeed, recent executive order ethics pledges have expanded the federal law's revolving door restrictions by preventing executive branch officials from engaging in certain forms of work indefinitely or for extended time periods once they leave government.[4] Thus, for specialized lobbyists with narrow expertise, these types of post-employment restriction may force these individuals—who otherwise are willing to serve in government for a limited time—to forego working in the public sector altogether.

Of course, not every executive branch official will use the proverbial revolving door when entering or leaving government service.[5] But for those that do, concerns over conflicts of interests, corruption, and transparency within our government institutions have justified strengthening these restrictions. Advocated who call for stronger revolving door regulations argue that such restrictions do not prevent individuals "from pursuing career opportunities in their areas of professional competence," but rather prevent them from serving two masters.[6] These advocates' concerns are premised on the belief that lobbyists who end up working in government will ultimately "make 'final decisions . . . [based on] private friendships and loyalties rather than . . . the public good,'" and thereby act corruptly for their own benefit.[7] Such concerns are not unfounded. One study found that, prior to the Ethics in Government Act of 1978,[8] there were over 500 cases of financial conflicts of interest within the federal government.[9] The study also revealed that several officials and agency heads were working in high-level positions which they previously had lobbied.[10] Unsurprisingly, scholarship is replete with data detailing the tendency of those serving in government being "captured" by the same

2. *Issues of Democracy: Advocacy in America*, 3 ELEC. J. U.S. INFO. AGENCY 2 (June 1998) (quoting then-Senator John F. Kennedy).

3 *See, e.g.*, PRESIDENT' S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR: REPORT AND RECOMMENDATIONS TO THE PRESIDENT 59 (1989).

4. *See* discussion *infra* Section II.B.

5. Several Obama executive branch appointees—for example, David Axelrod (former Senior Advisor to the President), Jerry Abramson (former White House Director of Intergovernmental Affairs), and Shailagh Murray (former Senior Advisor to the President)—never pursued lobbying careers after leaving the administration. Press Release, Univ. of Chi., University Creates New Institute of Politics (Jan. 19, 2012), www.uchicago.edu/features/20120119_axelrod/; Press Release, Bellarmine Univ., Abramson to Serve as Executive in Residence at Bellarmine (Jan. 18, 2017) www.bellarmine.edu/news/archives/2017/01/18/jerry-abramson-at-bellarmine/; Press Release, Colum. Univ., Shailagh Murray Appointed Executive Vice President for Public Affairs (Sept. 5, 2018), www.gca.columbia.edu/news/shailagh-murray-appointed-executive-vice-president-public-affairs.

6. Symposium, *Panel V: "The Revolving Door" – Should it Be Stopped?*, 32 ADMIN. L. REV. 383, 385 (1980).

7. David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 510 (2013) (quoting Senator Douglas).

8. Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

9. *See* ANDREW KNEIER, COMMON CAUSE, SERVING TWO MASTERS: COMMON CAUSE STUDY OF CONFLICTS OF INTEREST IN THE EXECUTIVE BRANCH (1976).

10. *Id.*

businesses and industries which these regulatory bodies are empowered to oversee.[11] Consequently, if the goal is to ensure that individuals do not use their time in government "as a way to promote their own interests over the interests of the American people," then ethics pledges must contain strong obligations that would prevent lobbyists from accessing information or working on issues that will ultimately enable them to benefit themselves or their former or future employer.[12]

But regardless of whether the government has engaged in actual ethical misconduct, public perceptions that government corruption exists, even if speculative, have the potential to create "more devastating effects than corruption itself . . . [by] generat[ing] a 'culture of [public] distrust' towards [government] institutions."[13] The danger of creating such a cynical culture has both political and social implications. As some scholars have observed, when citizens no longer trust particular politicians or government institutions, they become more likely to "support nonincumbent and third-party candidates," that fall outside of the standard political mold.[14] Thus, to overcome public cynicism toward the government and to rebuild the relationship between citizens and the executive branch, the government will need to adopt robust ethics obligations that eliminate even the appearance of impropriety.[15]

II. ATTEMPTS TO LOCK THE POLITICAL REVOLVING DOOR

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A. Federal Laws Governing Executive Branch Officials

While the public's concern over ethical impropriety by executive branch officials has grown over the last several decades, efforts to regulate the behavior of public officials during and after their time in government have occurred for almost a century.

One of the first federal restrictions addressing conflicts of interest came from a 1919 appropriations act. Under this act, federal employees who either (i) previously represented the U.S. in procuring military supplies, or (ii) engaged in the settlements or adjustments of contracts or agreements for procuring military supplies were prohibited from working or assisting with prosecuting and bringing claims against the U.S. for any contracts or agreements for procuring supplies for a period of two years after leaving their government position.[16] The inclusion of this provision indicates an early awareness by Congress of the potential harms that can arise from former government employees using insider knowledge and experience in public service for private sector employment. However, the depth of Congress's concern at that time may have been marginal, as it would take Congress another thirty years to pass new legislation that addressed conflicts of interest.[17]

Indeed, in 1948, Congress passed what is considered to be the first comprehensive federal lobbying law governing the activities and behaviors of government officials: the Legislative

11. *See* Suzanne Dovi, *The Ethics of the Revolving Door*, 12 GEO. J.L. & PUB. POL'Y 535, 544–48 (2014).

12. Obama Signing Remarks, *supra* note 16 (discussing the purpose of his ethics pledge).

13. Natalia Melgar et al., *The Perception of Corruption*, 22 INT'L J. PUB. OP. RSCH. 120, 120 (2010).

14. Virginia A. Chanley et al., *The Origins and Consequences of Public Trust in Government: A Time Series Analysis*, 64 PUB. OP. Q. 239, 240 (2000).

15. *See* Thurber, *supra* note 7, at 369.

16. Pub. L. No. 66-8, 41 Stat. 131 (1919).

17 Legislative Reorganization Act, Pub. L. No. 79-601, 60 Stat. 812 (1948).

Reorganization Act ("LRA").[18] Prior to its passage, the Special Senate Committee on the Organization of Congress held a hearing to discuss the public's concerns and sentiments about the legitimacy and accountability of government. Specifically, the Committee noted that public opinion had become "distorted and obscured by the pressures of special interest groups" and that Congress itself had struggled to legislate in the public interest.[19] The committee then pointed out how Congress had become "[b]eset by swarms of lobbyists seeking to protect this or that small segment of the economy or to advance . . . [a] narrow interest."[20] Given this growing distrust toward government, the joint committee incorporated various lobbying provisions within the Act in an effort to strengthen Congress's relationship with the public. One of these provisions required lobbyists to register under the law so that Congress could better "'evaluate and determine evidence, data, or communications from organized groups seeking to influence legislative action' and thus avoid the distortion of public opinion" by making their connections easily transparent.[21]

Excluding the LRA's various interpretive issues and challenges, one of the law's most glaring limitations in ensuring government accountability in policy decisions was that the Act *did not cover* lobbying of executive branch appointees and officials.[22] The upshot was that these government officials could engage in quid-pro-quo-like behavior, thus giving rise to potential policy-for-employment arrangements between government officials and corporate actors. This shortcoming, however, would later be resolved in 1995.[23]

It would be another three decades before Congress passed the Ethics in Government Act ("EGA").[24] Recent scandals involving President Nixon and the Watergate Hotel prompted renewed calls to preserve and promote ethics and accountability within the executive branch.[25] Under Title II of the EGA, several new ethics obligations for executive branch officials as well as imposed pre- and post-government service restrictions were adopted to address conflicts of interest and the revolving door.[26] For example, Section 201 required that upon entering their position, executive branch

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18. *Id.*

19 *Id.*

20. S. REP. NO. 791400, at 4 (1946).

21. George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 65 (1965).

22 Pub. L. No. 79-601, 60 Stat. 812, §§ 302, 307 (1948) (noting that "legislation" covered "bills, resolutions, amendments, nominations, and other matters pending or proposed *in either House* of Congress and includes any other matter which *may be the subject of action by either House*") (emphasis added). *See also* JACOB R. STRAUS, CONG. RSCH. SERV., R44292, LOBBYING DISCLOSURE ACT AT 20: ANALYSIS AND ISSUES FOR CONGRESS 11 (Dec. 1, 2015).

23. Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified at 2 U.S.C. §§ 1601 *et seq*.). Under the Lobbying Disclosure Act, Congress effectively expanded the scope and coverage of ethics obligations to include "covered executive branch official[s]"—this definition incorporated the President, Vice President, and officers or employees, or any other individual either (i) functioning in the capacity of such an officer or employee, in the Executive Office of the President, or (ii) serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order. 2 U.S.C. § 1602(3).

24. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599).

25. JACOB R. STRAUS, CONG. RSCH. SERV., R44974, ETHICS PLEDGES AND OTHER EXECUTIVE BRANCH EMPLOYEE RESTRICTIONS SINCE 1993: HISTORICAL PERSPECTIVE, CURRENT PRACTICES, AND OPTIONS FOR CHANGE 4 (Feb. 23, 2021); *see also* Adam Raviv, *Government Ethics in the Age of Trump*, 54 U. MICH. J.L. REFORM 331, 336–37 (2021); Thomas J. Satery, *The Ethics in Government Act of 1978 and Subsequent Reforms: The Effect of Political and Practical Influences on the Creation of Public Policy*, 13 SETON HALL LEGIS. J. 243 (1990).

26 Pub. L. No. 95-521 § 2, 92 Stat. 1824 (1978) (amended and repealed by Ethics Reform Act of 1989, Pub. L. 101-194, 103 Stat. 1716 (1989)).

employees—including the President and Vice President[27]—must file a report detailing potential conflicts of interest, including previous sources of income. Notably, the EGA also established the Office of Government Ethics, an independent agency within the executive branch, tasked with ensuring executive agencies' compliance with the new ethics requirements.[28] It also developed oversight and monitoring mechanisms to ensure that senior officials comply with their ethics commitments.[29] Over the years, amendments to the EGA have created various post-employment restrictions that prohibit government officials from lobbying before the federal government on matters that they worked on within the public sector in an effort to address the revolving door. Today, executive branch officials are subject to numerous ethical rules and prohibitions, including:

- lifetime bans on "switching sides" regarding involving specific parties on which any executive branch employee had worked personally and substantially while with the government;
- two-year bans on "switching sides" on broader range of matters which were under the employee's official responsibility;
- one-year bans on assisting persons with certain trade or treaty negotiations;
- one-year "cooling off" periods that bar "senior" officials from representing and communicating on behalf of parties before the departments or agencies that the senior official served in;
- a two-year "cooling off" period prohibiting "very senior" officials from communicating and attempting to influence certain high-ranking officials in the entire executive branch of government; and
- one-year bans (for certain officials) from representing or advising foreign governments or foreign political parties on certain matters.[30]

While these restrictions establish the ethical floor by which public officials must engage with private actors and conduct themselves while serving in government, certain shortcomings and limitations within these rules have led to several loopholes that allow individuals to bypass these legal obligations.

One issue that has prompted calls for reform has been the rise of "shadow lobbying." The term describes individuals who work to advocate or influence public policy but need not register as a lobbyist because they fail to meet certain criteria under the Lobbying Disclosure Act ("LDA").[31] The LDA defines lobbyists as any individual who is "employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a 3-month period."[32] Therefore, in an effort to bypass the law's requirements, shadow lobbyists will engage in lobbying activities for *less than* twenty percent of their time by mere technicalities (for instance, lobbying nineteen percent) or will work for clients for fewer than three months (for example, working for two months and twenty-nine days). The upshot is that although such conduct is permitted, the underlying activities effectively undermine the intent of the

27. 5a U.S.C. § 102; *id.* § 101 (f)(1)–(2) (requiring the president and vice president to file).

28. 5a U.S.C. § 401 *et seq*.

29. *See What We Do*, U.S. OFF. OF GOV'T ETHICS, www.oge.gov/web/oge.nsf/about_what-we-do (last visited Jan. 31, 2022).

30. STRAUS, *supra* note 41, at 26–27.

31. *Id.* at 20; *see* 2 U.S.C. § 1602(10).

32. 2 U.S.C. § 1602(10).

legislation—specifically, to avoid ethically suspect behavior by former government employees who have since gone on to work for companies wishing to influence government policy.

Another problem arising from the current federal framework is the sufficiency of the two-year cool-down period which prohibits former government officials from utilizing government contacts while attempting to influence public policy.[33] Obama administration's Special Counsel for Ethics and Government Reform and self-proclaimed "ethics czar," Norm Eisen, has suggested that two-year cooling-off periods are effective mechanisms to fight the problems of the revolving door. He notes that "[companies] will pay[] to put [officials] on ice for one year . . . to ply [their] contacts. But no one wants to pay [officials] to put [them] in cold storage for two years."[34]

Yet Eisen's defense of the two-year ban fails to fully appreciate today's political environment, and in particular the declining pace of the legislative process. Furthermore, his argument fails to consider circumstances where a President wins a second term (thereby allowing agencies to continue advancing their regulatory agendas). Thus, while the two-year ban may appear to eliminate the threat that public officials will use their government experience and connections for personal or private gain, the fact remains that such timeline may actually fail to achieve its intended purpose.[35]

B. Executive Order Ethics Pledges

As detailed above, the United States has developed a comprehensive ethics structure in an attempt to deter and combat ethical misconduct by government officials, particularly those serving within the executive branch. And yet, despite the obligations required under federal law as well as oversight by both political and non-partisan agencies—like the Department of Justice ("DOJ"), the Office of Government Ethics ("OGE"), the Government Accountability Office ("GAO")—problems and controversies still arise, and loopholes are continually found. Thus, to address the various shortcomings under the current framework, presidents have taken it upon themselves to unilaterally implement stricter ethics obligations on those serving within the executive branch.

Indeed, of the last five presidents to hold office, four have issued executive order ethics pledges as a means to raise ethical floor requirements for executive branch officials. Yet despite their intentions, each president derailed their pledge's success in various ways. This Section examines executive order ethics pledge provisions and considers their effect in promoting or eroding ethics and accountability within the president's branch.

President Clinton. On his first day in office, President Clinton issued an executive order ethics pledge affecting all "senior appointee[s] in every executive agency"[36] or approximately "1,100 [g]overnment officials, including 700 Presidential appointees who [we]re subject to Senate

33 18 U.S.C. § 207(b)-(d).

34. Isaac Arnsdorf, *Trump Lobbying Ban Weakens Obama Rules*, POLITICO (Jan. 29, 2017, 10:40 AM), www.politico.com/story/2017/01/trump-lobbying-ban-weakens-obama-ethics-rules-234318.

35. This is particularly true if these actors maintain personal relationships with those continuing to serve in government and later reemerge in a professional context to influence federal law and policy once the ban expires.

36. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 20, 1993). "Senior appointees" included "every full-time, non-career Presidential, Vice presidential or agency head appointee[s] in an executive agency." *Id.* at 5912.

confirmation."[37] Clinton's pledge expanded various restrictions within the 1989 Ethics Reform Act[38] by subjecting appointees to a five-year, post-government lobbying ban for issues that appointees "had personal and substantial responsibility" for, and a five-year ban on lobbying on behalf of foreign entities.[39] Officials were also subject to a five-year ban on utilizing government contacts for the purpose of lobbying.[40]

On its face, the pledge appears to be an effective tool in addressing the issue of the revolving door. By increasing cooling-off periods for government contacts, the pledge decreases a former official's likely success in lobbying in the private sector given that effective advocacy is largely influenced by the strength of one's relationships and connections in government.[41] Moreover, longer wait periods between when former officials can lobby on issues they directly worked on while in government reduces the threat that officials will use their time in public service for personal gain—an issue driving public distrust of government.[42] But while the ethics order appears to promote government accountability and ethics within the executive branch, certain features of the pledge allowed Clinton to shortchange its intended goal.

First, Clinton's pledge did not address the issue of *appointing* former lobbyists to government posts. Lobbyists who had previously lobbied on particular issues were able to serve in administration roles that they once sought to directly influence as a result. Second, the pledge did not ban ex-officials from lobbying the administration for the remainder of Clinton's term. Meaning, former officials who only worked one or two years within the Clinton administration could have essentially lobbied it during Clinton's last two years in office. Third, the pledge granted the President the power to waive pledge commitments for any individual if he believed doing so was in the "public interest."[43] While waivers were required to be published in the Federal Register, the pledge itself provided little guidance as to what constituted a sufficient justification—and failed to describe the level of specificity needed—to grant a waiver. Moreover, allowing a President to unilaterally grant waivers without supplemental oversight is an issue that runs counter to the goal of ensuring accountability within one's own branch of government. But Clinton's waiver provision was not the most damning aspect of his ethics pledge.

With less than a month left in office, Clinton wholly rescinded his executive order, effectively releasing all former and then-current senior administration appointees from every restriction within the pledge—including the stringent five-year bans.[44] This meant that those Clinton officials were now only bound to the ethics obligations covered under the federal law—namely the Ethics in Government Act.[45] Consequently, all senior appointees who had previously left the Clinton administration the year

37. Gwen Ifill, *Clinton Team Issues 5-Year Lobby Ban*, N.Y. TIMES (Dec. 10, 1992), www.nytimes.com/1992/12/10/us/the-transition-clinton-team-issues-5-year-lobby-ban.html.

38. Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989) (requiring one-to-two-year lobbying and government contact bans depending on an executive branch official's status).

39. *See* Ethics Commitments by Executive Branch Appointees, Exec. Order No. 12,834, 58 Fed. Reg. 5911 (Jan. 22, 1993).

40. STRAUS, *supra* note 44.

41. *See* Maggie McKinley & Thomas Groll, *The Relationship Market: How Modern Lobbying Gets Done*, HARV. CTR. FOR ETHICS (Feb. 13, 2015), https://ethics.harvard.edu/blog/relationship-market-how-modern-lobbying-gets-done.

42. *See* Rainie et al., *supra* note 3.

43. Ethics Commitments by Executive Branch Appointees, 58 Fed. Reg. at 5913.

44. Revocation of Executive Order 12834, Exec. Order No. 12,184, 66 Fed. Reg. 697 (Dec. 28, 2000).

45. 18 U.S.C. § 207.

prior to the revocation could effectively resume lobbying again.[46] Unsurprisingly, the move was not well received. Critics quickly noted that "Clinton got the benefit of appearing to be tough on the 'revolving door' while in office, [but] then in his last days sa[id], 'Never mind.'"[47] And the administration's attempt to defend the President's move—arguing that "the main policies underlying the Executive Order no longer appl[ied] . . . [because] there [wa]s a change of parties at the White House,"—simply ignored the fundamental principles that prompted creating a pledge in the first place.[48] Moreover, it disregarded the fact that former officials could still lobby Democratic members in the House and Senate, as well as career officials in non-appointed agency positions. While some media outlets covered news of the pledge being revoked, elected officials from the opposing party, however, did not appear to even be aware of the decision, even weeks after it occurred.[49] It seemed that larger concerns over the economy and the new incoming administration trumped concerns over ethics and accountability.

President Obama. Prior to President Obama taking office, executive branch officials under George W. Bush faced no heightened ethics requirements, as Bush chose to forgo adopting an ethics pledge during his eight years in office.[50] However, once President Obama was sworn in, he resurrected the use of presidential ethics pledges by signing Executive Order 13,490.[51] Compared to President Clinton's ethics pledge, Obama's appeared to be more comprehensive insomuch that it covered "*every appointee*" in the executive branch.[52] The pledge also placed new restrictions on the type of work *incoming lobbyists* could engage in and prevented them from working in agencies they once lobbied.[53] Yet, Obama's pledge was less restrictive insofar that it only placed two-year bans on post-government service lobbying and government contact.[54] However, the pledge appeared to try and compensate for this deficiency by requiring officials who left the administration be prevented from lobbying "any

46. *Id.* (discussing one-year bans).

47. Mintz, *supra* note 19.

48. Timothy P. Carney, *Clinton Presume to Nullify No-Lobbying Pledge*, 57 INSIDE WASH. 4 (Jan. 12, 2001).

49. *Id.*

50. President George W. Bush's decision to not adopt a similar pledge prompted mixed ethical responses. *See, e.g.*, David Litt, *Republicans Will Try to Create an "Ethics" Trap for Democrats. Don't Fall For It*, GUARDIAN (Jan. 25, 2021, 6:31 AM), www.theguardian.com/commentisfree/2021/jan/25/republicans-will-try-to-create-an-ethics-trap-for-demoocrats-dont-fall-for-it (noting that when "George W Bush took office, Republicans went all in on 'The K Street Project,' formally integrating lobbyists into conservative policymaking and vice versa. Industries who donated to Republican candidates and hired Republican staff were given access to party leaders. Those that did not were not."). Nevertheless, despite forgoing an executive order ethics pledge, President George W. Bush instead issued a presidential memorandum that advised executive agency heads to "ensure that all personnel within departments and agencies [we]re familiar with, and faithfully observe[d], applicable ethics laws and regulations." Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies (Jan. 20, 2001), www.georgewbush-whitehouse.archives.gov/news/releases/20010124-2.html. The memo did not impose new obligations on executive branch official, but rather reiterated existing statutory ethics obligations on executive branch officials, and reaffirmed general principles of government ethics like "not us[ing] public office for private gain . . . act[ing] impartially and not giv[ing] preferential treatment to any private organization or individuals . . . [and] maintain[ing] the highest standards of integrity in Government." *Id.*

51. Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

52. *Id.*

53. STRAUS, *supra* note 41, at 19–20.

54 Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,490, 74 Fed. Reg. 4673 (Jan. 26, 2009).

covered executive branch official or non-career Senior Executive Service appointee" for the remainder of Obama's time in office.[55]

Obama's pledge also contained a waiver provision that gave the Director of the Office of Management and Budget ("OMB"), not the president, the power to grant ethics waivers.[56] While the pledge did not require that the waivers be published in the Federal Register, it did mandate an "annual public report on the administration of the pledge."[57] However, in an effort to provide greater transparency, the administration created an exclusive White House webpage that provided a list of the executive branch officials who received ethics waivers.[58] However, despite the initiative's goal of providing greater public accountability, questions began to arise about whether the administration was being truly transparent about its waivers process after news outlets reported that the administration had "quietly releas[ed] a succession of four waivers, weeks and sometimes months after they were first granted."[59] Thus, not only were there questions about the number of waivers granted, additional concerns were raised about the process of review itself. Indeed, some of the waivers made publicly available by the administration only contained a few lines explaining why such waiver was granted.[60]

While President Obama himself did not revoke his administration's ethics pledge, the pledge was ultimately revoked by his successor, in order for President Trump to issue his own ethics pledge once he entered office.[61] The upshot is that while covered Obama officials were still subject to federal ethics restrictions, they were no longer bound to the Obama administration's tougher ethics obligations. These officials also were able evade the public scrutiny that the Trump and Clinton administrations received after revoking their ethics orders just prior to leaving office.

President Trump. In an effort to make good on his promise to "drain the swamp," President Trump issued an executive order ethics pledge that subjected executive branch appointees to enhanced revolving door restrictions.[62] Though Trump's pledge was stronger than Obama's insomuch that it created five-year restrictions pertaining to lobbying and government contacts, it was also weaker by having (i) reduced from two years to one, post-employment bans for appointees working on matters they previously engaged in but did not lobby,[63] (ii) allowed lobbyists to join the administration so long as their work did not involve anything they specifically lobbied on in the preceding two years,[64] and

55. *Id.*

56. *Id.* at 4675 (noting that waivers could be granted if they were in the "public interest," which included, but were not limited to, issues of "national security" and "the economy").

57. *Id.* at 4676.

58. *Ethics Pledge Waivers Released by the White House*, WHITE HOUSE, https://obamawhitehouse.archives.gov/briefing-room/disclosures/ethics-pledge-waivers (last visited Mar. 6, 2021) [hereinafter Obama White House Waiver Website].

59. Kenneth P. Vogel, *Grassley After W.H. Ethics Waivers*, POLITICO (June 10, 2009, 8:34 AM), www.politico.com/story/2009/06/grassley-after-wh-ethics-waivers-023612.

60. *See, e.g.*, ROBERT CUSICK, OFF. OF GOV'T ETHICS, FIRST ANNUAL REPORT ON THE PRESIDENT'S EXECUTIVE ORDER ON ETHICS 50 (2009), www.oge.gov/web/OGE.nsf/0/95CA4BF9134C4507852585B6005A14B5/$FILE/161fa958f2514391a87cfff0397f0d8e9.pdf (listing Valerie Jarrett's waiver).

61. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 13,770, 82 Fed. Reg. 9333, 9337 (Feb. 3, 2017) ("This order supersedes [President Obama's] Executive Order . . . and therefore . . . [it] is hereby revoked.").

62. *See generally id.*

63. Arnsdorf, *supra* note 53.

64. *Id.* Trump reportedly had 281 lobbyists serving within his administration during the first two years he was in office. MARTHA KINSELLA, RUDY MEHRBANI, WENDY R. WEISER & ELIZABETH GOITEIN, BRENNAN CTR. FOR JUST., EXECUTIVE ACTIONS TO RESTORE INTEGRITY AND ACCOUNTABILITY IN GOVERNMENT 14 (last updated Oct. 6, 2020).

(iii) permitted incoming lobbyists to work in government agencies they once lobbied.[65] Trump's pledge also contained a waiver provision that gave *the president and his designee* the authority to grant waivers.[66] But unlike his predecessors, Trump's pledge *did not require* waivers be published in the Federal Register nor even be made publicly available by the OGE—a move that appeared intentional. Additionally, the waiver provision failed to set forth any standards or criteria for which to grant waivers.[67] Then-Director of the GAO, Walter Shaub, noted that granting waivers had effectively become "a political decision, . . . mean[ing] career government ethics officials [w]ould no[] [longer] get involved" in waiver determinations.[68] Consequently, several groups within the executive branch were granted broad waiver exemptions.[69]

Three months into his term, media sources began reporting that waivers had been granted but had yet to be disclosed, prompting public concerns and growing distrust of the executive branch.[70] The administration initially sought to stay requests for copies of these waivers, calling into question the GAO's legal authority to request such information.[71] However, days later, former Director Shaub responded by rebutting the OMB's interpretation, noting that such requests were well within the agency's purview, and that "[p]ublic confidence in the integrity of government decisionmaking demands" independence, accountability, and transparency.[72] With increased public scrutiny and media reports,[73] as well as inquiry requests by members of Congress,[74] the administration ultimately relented, reporting that "at least 16" waivers had been granted within the first five months.[75] But like Clinton, Trump's waivers and efforts to forego transparency and compliance were not the most damning actions against his pledge.

During his last day in office, Trump wholly revoked his ethics pledge,[76] thereby freeing his officials from the rigorous five-year restrictions, which he himself said were necessary to address the

65. Arnsdorf, *supra* note 53.

66. Ethics Commitments by Executive Branch Appointees, Exec. Order No. 13,770, 82 Fed. Reg. 9333 (Jan. 28, 2017).

67. Virginia Canter, *Biden, Trump and Obama Ethics Pledges, Compared*, CITIZENS FOR RESP. & ETHICS IN WASH. (Feb. 9, 2021), www.citizensforethics.org/reports-investigations/crew-reports/biden-ethics-pledge-compared-obama-trump/.

68. Eric Lipton, Ben Protess, & Andrew W. Lehren, *With Trump Appointees, a Raft of Potential Conflicts and No Transparency*, N.Y. TIMES (Apr. 15, 2017), www.nytimes.com/2017/04/15/us/politics/trump-appointees-potential-conflicts.html.

69. *Waiver Certifications for WHO/OVP Employees*, OFF. OF THE WHITE HOUSE, https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/09/Waiver-Chart-092220.pdf (last updated Sept. 22, 2020).

70. Editorial, *Trump is Issuing Secret Waivers to His Own Ethics Rules. So Much for Draining the Swamp*, WASH. POST (May 6, 2017),www.washingtonpost.com/opinions/trump-is-issuing-secret-waivers-to-his-own-ethics-rules-so-much-for-draining-the-swamp/2017/05/06/60f11762-302a-11e7-9dec-764dc781686f_story.html.

71. Letter from Mick Mulvaney, Dir., Off. of Mgmt. & Budget, to Walter Shaub, Dir., Off. of Gov't Ethics (May 17, 2017).

72. Letter from Walter Shaub, Dir., Off. of Gov't Ethics, to Mick Mulvaney, Dir., Off. of Mgmt. & Budget (May 22, 2017).

73. *See* Bykowicz, *supra* note 18.

74. Letter from Dianne Feinstein, Gary C. Peters & Charles E. Grassley, U.S. Senators, to Mick Mulvaney, Dir., U.S. Off. of Mgmt. & Budget (Aug. 1, 2017), www.peters.senate.gov/imo/media/doc/2017-08-01%20Peters-Grassley-Feinstein%20Letter.pdf [hereinafter Senate Ethics Waiver Letter to OMB].

75. Rebecca Ballhaus, *Ethics Office Releases Nearly a Dozen Trump Waivers*, WALL. ST. J. (June 7, 2017, 2:47 PM), www.wsj.com/articles/ethics-office-releases-nearly-a-dozen-trump-waivers-1496858394.

76. Revocation of Exec. Order No. 13,770, Exec. Order No. 13,983, 86 Fed. Reg. 6835 (Jan. 19, 2021).

existing law's "loopholes."[77] Ironically, Trump's decision to revoke his pledge was a move which he frequently criticized former President Clinton for, suggesting that the "Clintons lifted the executive order so that . . . their [former officials] could start raking in cash."[78] Ultimately Trump faced greater backlash in revoking his order given his repeated calls to "drain the swamp."[79]

President Biden. President Biden's mission to restore ethics and accountability to the executive branch began with issuing an executive order ethics pledge on his first day in office. Though the administration is just a year and a half into its first term, certain provisions within the pledge identify its strengths and weaknesses. The pledge prevents lobbyists from serving in government, requires a two-year recusal from engaging in matters that new, incoming officials directly and substantially worked on while in the private sector, and requires a lifetime ban on representing foreign interests.[80] Additionally, President Biden implemented a one-year "shadow-lobbying" ban, tackling a significant issue that occurred in all of the previous administrations.[81]

Biden's ethics pledge confers onto the OMB Director the power to grant ethics waivers if doing so is "in the public interest."[82] While the pledge requires that the waivers be made publicly available within ten days after being granted, the Biden administration, like the Obama administration, appears to have made a deliberate yet cautious decision regarding the way in which it makes these waivers accessible to the public.[83] For example, the Biden administration's official White House website only lists ethics waivers that have been granted for officials working *within* the White House.[84] The upshot is that waivers for officials serving in different agencies and departments will be scattered across different platforms, making it more difficult for the public to access this information, and consequently harder to ensure public accountability and oversight over these public officials. In addition to the media's criticism, former GAO Director Walter Shaub has also expressed his concern over the lack of transparency, calling on the administration to "release all ethics-related documents, including waivers when people get an exception."[85]

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77. Tamara Keith, *Trump's Executive Order on Ethics Pulls Word for Word from Obama, Clinton*, NPR (Jan. 28, 2017), www.npr.org/2017/01/28/512201631/trumps-executive-order-on-ethics-pulls-word-for-word-from-obama-clinton.

78. *Id.*

79. *Id.*

80. Ethics Commitments by Executive Branch Personnel, Exec. Order No. 13,989, 86 Fed. Reg. 7029, 7029–30 (Jan. 25, 2021).

81 Caitlin Oprysko, *What's in Biden's Ethics Pledge*, POLITICO (Jan. 21, 2021, 3:55 PM), www.politico.com/newsletters/politico-influence/2021/01/21/whats-in-bidens-ethics-pledge-792904 ("The Biden ethics pledge also clamps down on so-called shadow lobbying—a top demand of good-government watchdogs—banning former officials from working behind the scenes to lobby until one year after they've left the government and prohibiting senior officials from holding out to lobby for one year.").

82. *Id.* at 7032 § 3(c). Biden's pledge lists several factors one "may consider" when determining whether to grant a waiver. However, including the phrase "*may consider*" indicates that these factors need not be considered every time one is contemplating granting a waiver, nor even at all.

83. *Id.* § 3(b).

84. *Ethics Pledges and Waivers*, WHITE HOUSE, www.whitehouse.gov/omb/information-for-agencies/ethics-pledges-and-waivers/ (last visited Mar. 26, 2021).

85. All Things Considered, *Biden's Ethics Pledge Is Tougher Than Past Administrations—But Is It Tough Enough?*, NPR (Feb. 1, 2021), www.npr.org/2021/02/01/962946837/bidens-ethics-pledge-is-tougher-than-past-administrations-but-is-it-tough-enough.

As of this moment, the Biden administration has only granted two waivers for individuals serving in the White House.[86] But the degree of specificity with which it has attempted to justify granting these waivers, as compared to last administration,[87] suggests that it is hoping to make good on its promise to increase transparency and avoid the appearance of misconduct in its decision-making processes.

III. ENSURING INTEGRITY AND ACCOUNTABILITY THROUGH EXECUTIVE ORDER ETHICS PLEDGES

This Part offers a series of recommendations to address the problems arising from ethics waivers and decisions to revoke an executive order ethics pledge. While some lawmakers[88] and scholars[89] have proposed drafting new legislation or amending current federal law to tackle the revolving door within the executive branch, this Note focuses solely on executive branch solutions in drafting and enforcing executive order ethics pledges. In focusing on this approach, the following Part offers a framework for how future presidents can impose more meaningful and substantive obligations through executive order ethics pledges that ensure government accountability during and after their time in office.[90]

A. "Unwaivering" Ethics

Depending on how a president decides to frame and move forward with granting waivers, utilizing the pledge's waiver provisions may therefore give the appearance of impropriety, or indicate that the administration is in fact actively trying to relieve its officials from having to adhere to the ethical obligations placed within the pledge. Moreover, efforts to withhold waiver information only exacerbate public distrust in government by creating the appearance that the administration is granting its waivers arbitrarily or for improper reasons.

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86. *Pledge Waivers (E.O. 13989) - Biden Administration*, U.S. OFF. OF GOV'T ETHICS, www.oge.gov/web/oge.nsf/Agency+Ethics+Pledge+Waivers+(EO+13989) (last visited Mar. 27, 2022) (listing White House ethics waivers for Kristine Lucius and Erika Moritsugu).

87. *Compare, e.g.*, Memorandum from Dana Remus, Counsel to the President, to Kristine J. Lucius (June 11, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Kristine-Lucius-Pledge-Waiver.pdf (justifying the grant of Lucius' waiver based on factors including "(i) the governments need for the individual's service, including the existence of special circumstances related to national security, the economy, public health, and the environment, the uniqueness of the individual's qualifications, to meet the government's needs; (iii) the scope and natural of the individual's prior lobbying activities . . . . and (iv) the extent to which the purpose of the restriction may be satisfied through other limitations on the individual's services.") *with* Memorandum from Counsel to the President, to Kellyanne Conway, Assistant to the President (last accessed Mar. 27, 2022), https://web.archive.org/web/20190802161646/https://www.whitehouse.gov/sites/whitehouse.gov/files/KELLYANNE%20CONWAY.PDF (noting only that White House Counsel "determined that it [wa]s appropriate and in the public interest to provide a limited waiver of the restrictions in section 1, paragraph 6, of the Executive Order to allow [Conway] to participate in meetings and communications with covered organizations which [Conway] otherwise may be barred from communicating or meeting with regarding broad policy matters and particular matters of general applicability in your official capacity even if the communication or meeting is not 'open to all interested parties.' The Administration has an interest in interacting with covered organizations on issues of importance to the Administration and [Conway's] position requires [her] to interact with covered organization.").

88. For the People Act of 2021, H.R. 1, 117th Cong. (2021); Executive Branch Conflict of Interest Act, H.R. 244, 117th Cong. (2021).

89. *See* STRAUS, *supra* note 41, at 19–31.

90 The purpose of limiting this Note's scope to the drafting and implementation of executive orders is based on the view that that these orders seek to implement ethics obligations that go beyond the obligatory ethics floor set forth by federal law. While Congress could, and arguably should, move forward with proposals that strengthen legal ethic commitments, it is likely that future presidents will continue to seek out new ways to restrict certain behaviors or practices that remain permissible even after Congress adopts new requirements.

The most effective solution for how to address many of the problems arising from ethics waivers is for administrations to wholly exclude adding waiver provisions within these executive ethics orders. Doing so would demonstrate a president's unequivocal commitment to unwavering ethics in his or her administration. As with any form of exception, one can always find reasons to justify waiving rules for certain individuals, and for administrations, this may be easy to do using the guise of "public interest" for people with particular backgrounds. There are, of course, some circumstances where granting waivers can help benefit the government and an administration's policy agenda.[91] But if presidents truly want to demonstrate their desire to hold lobbyists to a "higher standard of accountability" and "restore ethics in government,"[92] then eliminating waiver provisions within an executive order ethics pledge will help to send a clear message that no one, especially public servants, should be able to evade ethical obligations. A secondary benefit of excluding waiver provisions within ethics pledges is that doing so may help administrations avoid transparency issues associated with granting these waivers. Consider the dubious nature by which the Trump administration granted waivers for several of its officials. These actions triggered public distrust of his administration and the executive branch as an institution.[93] Thus, by eliminating waiver provisions altogether, administrations may be able to dispel public opinion that the executive branch is corrupt and ultimately help to restore public trust in government as a whole.[94]

Undoubtedly, most presidents will likely find this proposal to be extreme and therefore will decline to adopt this approach. Should a president ultimately decide to retain an ethics waiver within his or her executive order ethics pledge, then the alternative solution should be to include the following stipulations within the waiver provision. First, instead of bestowing the president with the power to waive an ethics provision, the pledge should grant the OGE or OMB Director, *in coordination with a GAO official*—Director or otherwise—the power to waive certain ethics obligations. Not only should these parties be involved in the consideration of a waiver request, but the provision should also require that *all parties involved in the review of a waiver must agree* to grant a particular official's waiver. Incorporating this requirement will help to avoid the appearance that executive branch ethics waivers are being granted improperly and arbitrarily.

Second, waiver provisions must include explicit conditions that go beyond mere "in the public interest" justifications when seeking to waive an obligation or commitment under the ethics pledge. For instance, it may be beneficial to require that the administration be unable to hire or recruit another individual with the same (or comparable) experience and expertise for a particular policy area. Under such provision, the OGE and GAO could require that the administration provide documentation of its proactive attempts to recruit and hire other applicants. For example, the administration could provide the agency or office with (i) communication records with those considered for a position, (ii) applicant materials such as resumes and cover letters, or (iii) declination letters and/or signed documentation by those individuals who would otherwise be qualified to serve in these roles but who have refused to accept or serve in that position. Adopting this requirement would not only increase transparency, but also serve as a middle ground for critics of waiver provisions primarily concerned with administrations governing blindly, and those worried about former lobbyists serving two masters.

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91. *See* discussion *supra* Section I.A.

92. *The Biden Plan to Guarantee Government Works for the People*, BIDEN HARRIS, www.joebiden.com/governmentreform/ (last visited Mar. 1, 2021).

93. Senate Ethics Waiver Letter to OMB, *supra* note 93.

94. Melgar et al., *supra* note 32, at 123.

Lastly, administrations must make all waivers, recusals, and related documents—for example, letters of support, communications regarding OMB's, OGE's, and GAO's waiver review and decisions, etc.—publicly available and place them in a centralized location on the White House website under the names of those officials receiving the waivers. This requirement will increase transparency and help to foster a better relationship between the American people and the executive branch. Moreover, to ensure greater government accountability, the pledge should also mandate publicly accessible, quarterly enforcement/compliance reports by both the OGE and GAO. Requiring both offices to produce reports may incentivize these agencies to engage in better oversight of the pledge's restrictions and ensure that the waivers are granted in accordance with the prescribed guidelines. It may also help thwart misrepresentations about whether these officials are, or have been, complying with the pledge if there is bias or undue political influence within the OGE.

Administrations face significant risks when choosing to adopt waiver provisions in their ethics pledges. Thus, while an ideal ethics pledge will forgo incorporating such a provision altogether, administrations may still be able to maintain its commitment to government accountability by including safeguards that prevent unilateral and arbitrary exceptions to ethics obligations within the executive branch.

B. Limiting Revocation's Harm

The voluntary nature of an executive order means that an ethics pledge's effectiveness will largely be dependent on an administration's attitude toward addressing government accountability. The Clinton and Trump administrations' decisions to revoke their pledge prior to leaving office illustrate how executive orders' discretionary characteristics create inherent risks in achieving its intended goals.

First, there is the risk that administrations will only adopt ethics pledges when doing so is politically advantageous. It may be that an administration simply wants *the appearance* of being committed to strong, ethical values in order to gain public support while quietly wanting to maintain its ability to escape its commitments when the political stakes are low. Presidents pursuing this path risk public fallout. But for a two-term president whose legacy is a strong economy with major policy achievements, revoking the pledge will have little, if any, consequences. Second, there may be instances in which an outgoing president does not revoke his or her own ethics pledge, but the incoming president revokes the predecessor's pledge in an attempt to implement his or her own commitments, as with Obama and Trump.

Presidents can address these issues several different ways. Ideally, presidents should wholly avoid revoking their ethics pledge during, or while leaving, office. Allowing one's ethics pledge to run its course helps avoid the appearance of having made superficial ethics restrictions that were only meant to serve a political purpose. Indeed, if the true purpose of an executive order ethics pledge is to address the loopholes within the current federal laws so as to prevent executive branch officials from utilizing the revolving door—then presidential revocations undoubtedly undermine the pledge's ability to achieve these goals by exploiting a system that enables public servants to inappropriately benefit from their time in government. But given that two of the last four presidents have revoked their ethics pledges, an alternative solution may be necessary if presidents who revoke their orders are to retain some semblance of accountability.

One possible alternative is to have presidents postpone the enforcement on the pledge's revocation. Specifically, outgoing presidents that revoke their pledge should include within the revocation order stipulations that delay when that revocation enters into force. While such an approach may be uncommon, it is not unprecedented. For example, when President Clinton revoked

his ethics pledge the month prior to leaving office, he included language that delayed the revocation's enforcement until George W. Bush was sworn in as president.[95] Thus, for administrations seeking to free their officials from rigorous ethics obligations yet simultaneously seek to embody some type of ethical values, *presidents should delay their revocation's enforcement for an extended period of time—i.e., one or two years*. While delaying enforcement may substantially shorten or void some obligations, other restrictions may ultimately run their full course. And while delayed revocations may nevertheless still indicate that a president has compromised their ethical values, choosing this path fairs far better than the alternative.

Next, for incoming administrations seeking to create their own ethics pledge, safeguard provisions should be included to avoid freeing an outgoing administration's executive branch officials from that administration's ethics pledge. Specifically, new pledges should contain language that grandfathers the previous administration's ethics obligations for the covered outgoing officials. To do so, the new executive order should explicitly state that the creation of the new pledge does not revoke the ethics obligations binding the outgoing administration's officials. The upshot is that mere technicalities will no longer allow former officials to escape their administration's ethics requirements when that outgoing administration never even intended to release its officials from their obligations.

95. Revocation of Executive Order 12834, Exec. Order No. 12,184, 66 Fed. Reg. 697 (Dec. 28, 2000) ("Executive Order 12834 of January 20, 1993, 'Ethics Commitments by Executive Branch Appointees,' *is hereby revoked, effective at noon January 20, 2001*. Employees and former employees subject to the commitments in Executive Order 12834 *will not be subject to those commitments after the effective date of this order*.") (emphasis added).

Applicant Details

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Middle Initial	**A**
Last Name	**Kain**
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Contact Phone Number	**7034028403**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Boston College Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=12201&yr=2011**
Date of JD/LLB	**May 20, 2021**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**Boston College Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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References

Professor Cheryl Bratt, cheryl.bratt@bc.edu, 617-552-8092

Professor Robert Bloom, robert.bloom@bc.edu, 617-552-4374

Professor Kari Hong, kari.hong@bc.edu, 617-552-4390

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MICHELLE KAIN

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August 27, 2020

The Honorable Elizabeth W. Hanes
U.S. District Court for the Eastern District of Virginia
Spottswood W. Robinson III & Robert R. Merhige, Jr. Federal Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a 3L at Boston College Law School, and I am writing to apply for a clerkship in your chambers for the 2021-2023 term. Although I am attending law school in Massachusetts, I grew up in Northern Virginia and received my undergraduate degree at the University of Virginia. I am very interested in returning to Virginia after graduation.

As a student at Boston College Law School, I have pursued various opportunities to develop my legal research and writing skills. As a Law Clerk at the Office of Immigration Litigation at the Department of Justice last summer, I researched and drafted two briefs for submission to the Ninth Circuit Court of Appeals. This past year, I was a staff writer on the *Boston College Law Review* and was chosen to serve as a Research Assistant for Law Practice I and II, Boston College's first-year legal writing course. In this role, I provided students with substantial feedback on their writing and their citations in particular. Through each of the aforementioned experiences, I have gained a deeper understanding of the Bluebook and have become a more effective researcher and a clear and concise writer. I expect to continue to develop these skills this upcoming year through my participation in the Ninth Circuit Appellate Project, a clinic that allows students to argue an immigration case in federal appeals court, and as a member of the Executive Board of the *Boston College Law Review*. As Executive Comments Editor, I conducted extensive research in a range of areas of the law to select noteworthy cases for the staff writers to write about, and I will perform comprehensive edits of the Comments that are selected for publication.

I am confident that my previous experiences, as well as my research and writing skills, make me a strong candidate for a clerkship in your chambers. I would greatly appreciate the opportunity to discuss my interests and qualifications with you in further detail. Enclosed please find my résumé, law school transcript, and a writing sample. Additionally, Boston College will submit three letters of recommendation from Professors Cheryl Bratt, Robert Bloom, and Kari Hong. Thank you for your consideration and please feel free to contact me with any questions.

Respectfully,

Michelle Kain

Enclosures

MICHELLE KAIN

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EDUCATION

Boston College Law School — Newton, MA
Candidate for Juris Doctor — May 2021
GPA: 3.616/4.0 (Top 15% = 3.624)
Honors: *Boston College Law Review*, Executive Comments Editor, 2021-22 & Staff Writer, 2020-21
Publications: Michelle Kain, Comment, *A* Gray *Area: The Scope of Title II of the ADA's Applicability to Ad Hoc Police Encounters*, 61 B.C.L. REV. E. SUPP. II.-93 (2020).
Michelle Kain, Note, *The Impact of Marijuana Decriminalization on Legal Permanent Residents*, 62 B.C.L. REV. ____ (forthcoming 2020).
Pro Bono: *Southern Poverty Law Center*, Spring Break 2019, Folkston, GA
Drafted letters of support, interviewed detainees, and assisted with document collection
Lawyers Clearinghouse, Boston, MA
Interviewed clients at a local youth homeless shelter to determine if they had viable legal claims

University of Virginia — Charlottesville, VA
Bachelor of Arts, with Distinction, Foreign Affairs and Spanish — May 2017
GPA: 3.6/4.0
Honors: Dean's List (4/8 semesters)
Activities: Sigma Kappa Sorority; Phi Alpha Delta Pre-Law Fraternity
Volunteer for Latino and Migrant Aid Program and English as a Second Language Program
Study Abroad: University of Virginia in Valencia, Spanish Immersion Program, Summer 2015

EXPERIENCE

Ninth Circuit Appellate Project, Boston College Law School — Newton, MA
Student Attorney — August 2020 – May 2021

Ropes & Gray LLP — Boston, MA
Summer Associate — Summer 2020

Professor Cheryl Bratt, Law Practice I and II, Boston College Law School — Newton, MA
Research Assistant — June 2019 – ongoing

- Graded and commented on students' writing for citation errors, prepared multiple presentations on Bluebook format, created an exam testing students' understanding of core Bluebook rules, and mentored students on methods to improve their writing
- Managed 1L students' participation in Lawyers Clearinghouse's pro bono legal clinics by coordinating with students, professors, and Lawyers Clearinghouse staff
- Conducted research and wrote source summaries to support Professor Bratt's academic writing

Department of Justice, Office of Immigration Litigation – Appellate Section — Washington, D.C.
Law Clerk — Summer 2019

- Researched and drafted two briefs on issues of asylum and withholding of removal and wrote a motion to consolidate two appeals for submission to the Ninth Circuit Court of Appeals
- Prepared and circulated memoranda providing the Directors' recommendations regarding whether to seek further review in adversely decided cases
- Participated in a moot court oral argument before a panel of four attorneys

Fragomen, Del Rey, Bernsen & Loewy, LLP — Washington, D.C.
Administrative Assistant — June 2017 – June 2018

- Prepared and filed various types of immigrant and non-immigrant visa petitions with USCIS
- Worked directly with corporate clients and individual foreign nationals to obtain the documents necessary to initiate cases with the firm and maintained overall data integrity

LANGUAGE SKILLS: Proficient in Spanish

Michelle Kain
Boston College Law School
Cumulative GPA: 3.616

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Robert Bloom	A-	4	
Contracts	Sean O'Connor	B+	4	
Law Practice I (Legal Writing)	Cheryl Bratt	A	3	
Torts	Judith McMorrow	B+	4	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Harold Greenfield	B+	4	
Criminal Law	Kari Hong	A-	4	
Introduction to Pre-Trial Civil Litigation	Linda Simard	A-	3	
Law Practice II (Legal Writing)	Cheryl Bratt	A	2	
Property	Joseph Liu	B+	4	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Brian Quinn	A-	4	
Death Penalty	James Dowden	A-	3	
Professional and Moral Responsibility	Michael Cassidy	A-	3	
Trusts and Estates	Ray Madoff	A	4	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Legal Research	Amy Bruce, Mary Ann Neary	Pass	3	
Criminal Procedure	Robert Bloom	Pass	3	
Tax I	James Repetti	Pass	4	

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Michelle Kain

Dear Judge Hanes:

I write with utmost enthusiasm in support of Michelle Kain's application for a clerkship in your chambers. Michelle is an extraordinary student whom I have had the privilege of getting to know and work with over these last two years. She is an extremely bright and talented legal researcher and writer, a diligent and dependable student and teaching assistant, and a remarkably collaborative and affable individual. Her extraordinary talents, work ethic, and positive attitude will add great value to any chambers. I feel lucky to have had her as a student, and grateful that she agreed to be my teaching assistant this past year as well as next year; I would be lost without her.

Michelle was a top student in my 2018-2019 Law Practice courses, ranking first out of thirty-nine students during the fall term, and third during the spring term. Law Practice is a full-year required course in which all 1L students learn practical skills through simulation-based classroom exercises. Specifically, my students practice researching cases, statutes, and regulations; crafting effective legal arguments; drafting objective office memoranda and emails; and writing persuasive court documents, namely motions and memoranda of law. Students also engage in client interviewing, client counseling, oral advocacy, and negotiations. Through these exercises, students participate in routine team work and must demonstrate professional and ethical behavior. The courses require a significant time commitment from 1L students, and they receive a lot of individual attention from me through frequent one-on-one meetings. In this context, I get to know all of my students fairly well, but Michelle made a marked impression.

Michelle's analytical, research, and writing skills are unrivaled. She is able to take incredibly complex concepts about unfamiliar topics (for example, legal implications of a Nebraska non-compete clause in an employment contract) and explain them clearly and precisely to a reader. While other students struggled to understand and then convey the law, Michelle did this with ease, earning top marks on all of her assignments. She consistently digested tangled case law, extrapolated the essential components, and communicated her findings clearly and completely. Michelle is also a skilled researcher. As a student, she conducted wide-ranging research involving federal cases and statutes, state cases and statutes, Federal Rules of Civil Procedure and Evidence, secondary sources, and more. She performed efficient and intentional research, and her findings were always reliable. Indeed, I found her first-year research and writing skills more impressive than some junior associates who I managed when I practiced at a major law firm. For all of these reasons, it was no surprise to me that Michelle was selected for the Boston College Law Review, and then this past year elected to the Executive Board as one of two Executive Comments Editors.

Beyond research and writing, Michelle also embraces challenges with positivity and gusto. For example, in my course, she had a terrific attitude when participating in our various simulations. Outside of research and writing, I also require my students to conduct client interviews and counseling sessions, oral arguments, peer-editing sessions, and negotiations. These activities are not graded, and as a result, some students exert less effort towards them. But Michelle always took them incredibly seriously and showed such professionalism and aptitude when participating. Further, she was one of the first volunteers to engage in a live-client, pro bono opportunity that I offered my students, which required them to interview residents of a homeless shelter and assess how a lawyer could assist them with their problems, including through non-legal avenues. She embraced this task with skill, humility, and passion, demonstrating empathy and compassion.

In view of Michelle's many talents, I hired her to work as one of my four teaching assistants this past academic year. As a teaching assistant, she drafted model answers to various research and writing assignments for me to use when grading, created and taught several classes on Bluebook citation, developed answer keys for and graded students' citations assignments, and conducted substantive research to help me develop new assignments. She also conducted important research that I relied on when writing an upcoming law review article, and she helped manage the live-client program (referenced above) that I offer my 1L students. She always volunteered to take on new tasks, worked collaboratively with my other teaching assistants, and produced excellent materials. Indeed, Michelle is incredibly responsible and organized, such that I could give her an assignment and then forget about it, trusting fully that she would complete it perfectly and efficiently. Michelle is also skilled at managing up by keeping me abreast of her work, asking for feedback at appropriate junctures, and reminding me of deadlines. Put simply, I know my courses would not have been as successful without her stellar work and assistance. For these reasons, I was thrilled when Michelle agreed to continue next year as my senior teaching assistant, and I look forward to further developing my curriculum with her, in view of her sharp mind, creativity, and energy.

Beyond Michelle's academic chops, she is also kind and good-natured. I have spent significant time with Michelle through my courses and while supervising her as my teaching assistant. She is professional, but not stiff; confident, but humble; and warm, funny, and kind. Having clerked at the federal district and appellate level, I know the close confines of a judge's chambers, and I would have considered myself very lucky to have Michelle as a co-clerk. I have no doubt that she will befriend the court staff, chambers personnel, and judges alike.

Thank you for this opportunity to express my wholehearted enthusiasm for Michelle Kain. Please do not hesitate to contact me if you have any questions.

Sincerely,

Cheryl Bratt
Assistant Professor
Boston College Law School

Cheryl Bratt - cheryl.bratt@bc.edu - 617-552-4340

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Michelle Kain

Dear Judge Hanes:

It is with great pleasure that I recommend the above applicant for a clerkship. Michelle was a student of mine in Civil Procedure during the fall of 2018, and she is currently my student in Criminal Procedure. I have had several conversations with her and I had the pleasure of reviewing her law review Comment.

Although initially Michelle was not an active participant in civil procedure, when I discovered her (large class) the last third of the semester, she dealt very effectively with my most difficult questions. She has been a very valuable participant in criminal procedure. As a matter of fact, I called on her today and she was very well prepared and handled my constant questioning with ease.

Given her class participation, it is not surprising that her examination in civil procedure was one of the best in the class. In preparing this letter, I have reread her exam. She writes superbly. She is very well organized, and has a clear and concise writing style. She gets to the point quickly. She demonstrated a thorough grasp of the subject matter, clearly mastering the subject. Given her performance in this exam, as well as her questions and answers throughout the course, I would conclude that she has superb analytical ability. My opinion is shared by my colleagues. I should point out that she has not yet taken the criminal procedure exam.

She is a very easy person to like. She has great self-esteem, and seems comfortable in any situation. She has many friends who seem to admire and respect her. Her qualities were recognized by her classmates as she was recently elected to be the executive comments editor of the law review.

Another outstanding quality Michelle has is her involvement in public interest. She has worked in a variety of settings including the Justice Department on immigration matters. Most recently she was chosen by Professor Kari Hong to participate in her clinic. She will likely argue an immigration case in front of the Ninth Circuit. This is consistent with this law school's Jesuit mission and I might add my own tradition of using your education in the service of others.

Given the importance of clerk letters, I only write recommendations for people I believe will be a credit to this law school and themselves. Michelle has the experience, character, and work ethic to make an outstanding clerk. There is no doubt she has the intelligence, analytical skills, insight, personality, and work habits to make an outstanding clerk.

If I can be of further assistance feel free to call (617) 552-4374 or email bloom@bc.edu.

Sincerely,

Robert M. Bloom
Professor
Professor of Law and Dean's Distinguished Scholar

August 27, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Clerkship Candidacy of Michelle Kain

Dear Judge Hanes:

I am writing to strongly recommend Michelle Kain for a clerkship position. Michelle is intelligent, is hardworking, is a great team player, and has a deep dedication to community service.

Michelle is a highly intelligent. Her high GPA attests to her ability. But also, a review of her transcript shows a trend towards A grades in her second (and I presume) her third year. Like many intelligent students, first year grades do not reflect their true capacity. As Michelle engages, learns, and develops, my impression of her is that she is going to find much success in her legal career. I say that because Michelle has a combination of hard work and talent, a combination that will lead to success in her future endeavors.

Michelle also shows a willingness and eagerness to learn. I selected her to be in my Ninth Circuit Appellate Program, a clinic that lets third year students brief and argue cases to the Ninth Circuit Court of Appeals. I chose Michelle because it is clear to me that she can master difficult issues, teach herself how to learn, and work very well with others. Michelle will be in a team of three working on a complex asylum claim. During this next year, she will be writing an opening brief, a reply brief, and present oral argument. I believe that this experience will prepare her well for a clerkship, as she will appreciate how any appeal has complex issues and requires an eye for nuance and clarity.

Michelle is someone who will succeed in the small chambers setting. Michelle gets along very well with others. She is friendly, listens well, and always conducts herself in a professional manner. I suspect that she will quickly become a valued colleague and employee in any place she works.

Lastly, Michelle stands out because of her dedication to public service. Since college, she has volunteered and selected jobs that serve the public. It is keeping with her values that she seeks to work for the judiciary due to her sense of public service.

I strongly support Michelle's candidacy for a clerkship without any reservation. If I can provide any further information, please do not hesitate to contact me at kari.hong@bc.edu or on my cell phone (510) 384-4524.

Most sincerely,

Kari Hong
Associate Professor

MICHELLE KAIN
75 Brainerd Rd. Apt. 415, Allston, MA 02134 | Permanent Address: 1881 N. Nash St. Unit 1909,
Arlington, VA 22209 • kainm@bc.edu • 703-402-8403

The enclosed writing sample is an excerpt from the Case Comment I wrote during the Fall 2019 semester as a Staff Writer for the *Boston College Law Review*. The enclosed draft reflects some edits and suggestions made by my assigned 3L editors throughout the drafting process. However, this version of my Comment is not the final draft and does not reflect the more substantial edits made by the Executive Comments Editor and the Executive Senior Editor after my Comment was selected for publication. The full Case Comment can be provided upon request.

A *GRAY* AREA: THE SCOPE OF TITLE II OF THE ADA'S APPLICABILITY TO AD HOC POLICE ENCOUNTERS

Abstract: [omitted]

INTRODUCTION

Although they number fewer than four in every one hundred adults in the United States, individuals with severe mental illness bring about no less than one in ten calls for police assistance.[1] Worse still, these individuals make up a disproportionate number of those killed while interacting with police.[2] Indeed, individuals with untreated mental illness are sixteen times more likely to be killed by police than other civilians.[3] These violent police encounters often give rise to civil lawsuits alleging discriminatory treatment for which the Americans with Disabilities Act (the "ADA"), which prohibits discrimination on the basis of disability, is a common vehicle.[4]

Title II of the ADA in particular ensures that individuals with disabilities are able to participate in, and thus benefit from, the "services, programs, or activities" of public entities.[5] Because the phrase "services, programs, or activities" is not defined by the ADA, courts are divided on whether arrests and other police encounters fall within the scope of this language.[6] The answer to this question has proved to be insignificant, however, because the statute contains a "catchall" provision enabling an individual to state a claim under Title II simply by demonstrating that he or she was "subjected to discrimination" by a public entity.[7] Nevertheless, courts disagree

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[1] DORIS A. FULLER ET AL., TREATMENT ADVOCACY CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf.

[2] *Id.*

[3] *Id.*

[4] 42 U.S.C. § 12101(b)(1) (2018); *see, e.g.*, Gray v. Cummings, 917 F.3d 1 (1st Cir. 2019) (asserting ADA claim in response to alleged discrimination); Haberle v. Troxell, 885 F.3d 171 (3d Cir. 2018) (same); Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1084 (11th Cir. 2007) (same).

[5] 42 U.S.C. § 12132 (2018).

[6] *See* 42 U.S.C. § 12131 (2018) (defining "public entity" and "qualified individual with a disability" only); *Haberle*, 885 F.3d at 180 (noting that courts disagree on whether arrests constitute "services, programs, or activities of a public entity").

[7] *See* 42 U.S.C. § 12132 (stating that "no qualified individual with a disability shall . . . be subjected to discrimination by any such entity"); *Haberle*, 885 F.3d at 180 (referring to the "subjected to discrimination" language as a "catch-all phrase").

on the point during an arrest at which Title II begins to apply.[8] Indeed, several courts have held that Title II of the ADA applies to an arrest without exception, whereas the Fifth Circuit has held that the mandates of Title II are inapplicable prior to the officers "securing the scene."[9]

In 2019, in *Gray v. Cummings*, the First Circuit joined the discussion, considering for the first time whether, and to what extent, Title II applies to police encounters involving disabled individuals.[10] The First Circuit declined to answer the question, choosing to assume that Title II applied to the incident at hand for the sole purpose of adjudicating the claim on narrower grounds.[11]

Part I of this Comment develops the legal, factual, and procedural background of *Gray*.[12] Part II considers the inconsistent approaches that federal courts of appeals have utilized in applying Title II of the ADA to arrests, and highlights the First Circuit's reluctance to adhere to either one.[13] Part III advocates for the approach adopted by the majority of circuits, rather than that of the Fifth Circuit, as it better adheres to the language of and legislative intent behind Title II and provides sufficient protection for both disabled individuals and law enforcement personnel, thus allowing for a more fact-specific inquiry.[14]

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[8] *Haberle*, 885 F.3d at 181.

[9] *Compare Bircoll*, 480 F.3d at 1084 (stating that there is no question as to Title II's applicability to the police encounter at hand because Title II prohibits public entities from discriminating based on disability), *and* Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (noting that "a broad rule categorically excluding arrests from the scope of Title II . . . is not the law"), *with* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (holding that Title II is inapplicable to ad hoc police encounters before the officer is able to "secur[e] the scene" and "ensur[e] that there is no threat to human life").

[10] *Gray*, 917 F.3d at 16–18 (sitting by designation was retired Justice David Souter); *see also* Maria Cramer, *An Officer Tased a Bipolar Patient. Did he Violate a Law Protecting the Disabled?*, BOSTON GLOBE, Jan. 9, 2019, at B1 (describing the questions facing the First Circuit in *Gray* as "what constitutes reasonable force against a person with mental illness and whether a police officer's tactics for subduing suspects with disabilities can be limited by the [ADA]").

[11] *Gray*, 917 F.3d at 17.

[12] *See infra* notes 15–48 and accompanying text.

[13] *See infra* notes 49–82 and accompanying text.

[14] *See infra* notes 83–105 and accompanying text.

I. TITLE II OF THE ADA AND THE FACTUAL AND PROCEDURAL BACKGROUND OF *GRAY V. CUMMINGS*

In 2019, in *Gray v. Cummings*, the First Circuit was presented with an issue that has troubled its sister courts – the scope of Title II's application to police encounters.[15] Section A of this Part describes Title II of the ADA.[16] Section B develops the facts and procedural posture of *Gray*, leading up to the First Circuit's analysis.[17]

A. Title II of the ADA

The ADA is designed to protect individuals with qualified disabilities from discrimination.[18] Title II in particular states that "qualified individuals" may not be denied the opportunity to participate in, and thus reap the benefits of, a public entity's "services, programs, or activities."[19]

While the phrases "qualified individual" and "public entity" are clearly defined by the ADA, the phrase "services, programs, or activities" is not.[20] As such, courts are divided on the issue of whether arrests made by police officers constitute the "services, programs, or activities" of a public entity, such that the arrest itself, or the manner in which the arrest is carried out, may constitute discrimination.[21] Because Title II is framed in the alternative, however, allowing a plaintiff to prevail merely by proving that he or she experienced discrimination at the hands of a public entity, rather than that arrests fall within a public entity's "services, programs, or activities," several courts have avoided categorizing them as such.[22] Accordingly, whether based on the conclusion that arrests constitute the "services, programs or activities" of a public entity or on the statute's blanket prohibition of discrimination by a public entity, there is a general agreement that Title II governs arrests.[23]

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[15] *Gray*, 917 F.3d at 16.

[16] *See infra* notes 18–29 and accompanying text.

[17] *See infra* notes 30–48 and accompanying text.

[18] *See* 42 U.S.C. § 12101(b)(1) (noting that the purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

[19] 42 U.S.C. § 12132 (stating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"); *see also Gray*, 917 F.3d at 14–15 (differentiating Title II from Title I and Title III, which prevent disability-related discrimination in employment and the provision of public accommodations respectively).

[20] Ryan Lefkowitz, *What Are You En(title)d Two? Protecting Individuals with Disabilities During Interactions with Law Enforcement Under Title II of the ADA*, 49 U. MEM. L. REV. 707, 717 (2019) (noting that Title II does not define "services, programs, or activities"). Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). The term "disability" refers to "a physical or mental impairment that substantially limits one or more major life activities of such individual," "a record of such impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1). A "public entity" is defined as "any State or local government," as well as "any department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1). Thus, because a police department is undoubtedly considered a "public entity," that its "services, programs, and activities" is governed by Title II is undisputed. *Gray*, 917 F.3d at 16; *see also Haberle*, 885 F.3d at 179–80 (stating that police departments easily fall within the definition of a public entity).

[21] *Haberle*, 885 F.3d at 180. Indeed, in *Rosen v. Montgomery County*, the Fourth Circuit stated that "fitting an arrest into the ADA at all" was an "obvious problem," declining to find that a drunk driving arrest was covered under Title II of the ADA. 121 F.3d 154, 157 (4th Cir. 1997). The Fourth Circuit seemed to reason that voluntary participation on the part of the disabled individual was required in order for that individual to participate in, or benefit from, the "services, programs, or activities" of the county. *See id.* In light of the Supreme Court's holding in *Pennsylvania Department of Corrections v. Yeskey*, however, the Fourth Circuit's narrow interpretation of Title II has since been called into question. Lefkowitz, *supra* note 20, at 717. In *Yeskey*, the Court rejected the petitioner's argument that prison "services, programs, or activities" do not fall within the scope of Title II because participation in them is involuntary. 118 S. Ct. 1952, 1955 (1998). Shortly thereafter, in *Gorman v. Bartch*, the Eighth Circuit held that a "qualified individual may participate in a service on either a voluntary or a mandatory basis," or, in other words, that "services, programs, or activities" of a public entity need not be voluntary in order to be covered by Title II of the ADA. 152 F.3d 907, 912 (8th Cir. 1998). Recently, courts that have held that arrests are a public service or activity have relied, at least in part, on a Department of Justice regulation that states Title II "applies to anything a public entity does." 28 C.F.R. § 35.102.

[22] *See, e.g.*, *Haberle*, 885 F.3d at 180 (concluding that it is unnecessary to decide whether arrests constitute the "services, programs, or activities" of a public entity due to the language of § 12132 which allows the arrestee to demonstrate instead that he or she was "subjected to discrimination" by the police); *Bircoll*, 480 F.3d at 1084 (declining to entire the debate regarding whether police conduct during the course of an arrest falls within the "services, programs, or activities" of public entities in light of Title II's catchall phrase).

[23] Lefkowitz, *supra* note 20, at 718.

Courts have recognized two ways in particular that a police officer may violate the ADA while executing an arrest.[24] The first, which the First Circuit refers to as the "effects" theory, finds that a police officer may violate the ADA by improperly arresting an individual with a disability because the officer misperceived the outward manifestations of that disability as criminal activity.[25] The second, known as the "accommodation" theory, finds that a police officer may violate the ADA by failing to reasonably accommodate an individual's disability during the course of an arrest, thus causing the individual to suffer unnecessary harm.[26] Notably, the latter generally requires the consideration of exigent circumstances, circumstances which create a threat to human life or safety, as they are critical in determining the reasonableness of a proposed accommodation.[27]

Although all federal courts of appeals to address the question have found that exigent circumstances play a significant role in evaluating Title II's applicability to arrests, courts differ on the nature of that role.[28] Specifically, some courts have held that exigent circumstances relieve the officer of his or her duty to reasonably accommodate an individual's disability, thus precluding the individual from bringing a claim under Title II of the ADA, while others have held that exigent circumstances shed light on

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[24] *Gray*, 917 F.3d at 15.

[25] *Id.* (quoting *Gohier*, 186 F.3d at 1220). Notably, other courts have referred to this theory as the "wrongful-arrest" theory. *See, e.g.*, *Gohier*, 186 F.3d at 1221.

[26] *Gray*, 917 F.3d at 15. Additional support for this theory is found in the Department of Justice regulation which states that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7)(i).

[27] *See* Robyn Levin, Note, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269, 282, 285 (2017) (indicating that courts adjudicating reasonable accommodation claims must consider whether the exigent circumstances made the requested accommodation unreasonable). Exigent circumstances are defined as (1) "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures," (2) "[a] situation in which a police officer must take immediate action to effectively make an arrest, search, or seizure for which probable cause exists," and (3) "[e]xigent circumstances may exist if . . . a person's life or safety is threatened." *Exigent Circumstances*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Carly A. Myers, Note, *Police Violence Against People with Mental Disabilities: The Immutable Duty under the ADA to Reasonably Accommodate During Arrest*, 70 VAND. L. REV. 1393, 1413 (2017) (defining exigent circumstances as circumstances that were present where "there is a perceived danger to a police officer or the public that is, at least in part, caused by a person's unlawful activity").

[28] Myers, *supra* note 27, at 1413.

the reasonableness of the officer's actions, but do not operate as a prohibitive bar to liability.[29]

B. The Factual Background and Procedural Posture of Gray

On May 2, 2013, Judith Gray ("Gray"), who suffers from bipolar disorder, experienced a manic episode and called 911.[30] Police officers from the Athol Police Department transported Gray to Athol Memorial Hospital where she was admitted pursuant to a Massachusetts law permitting the involuntary hospitalization of individuals who pose a serious risk of harm due to mental illness.[31] Approximately six hours later, however, when hospital staff discovered that Gray had left the hospital without authorization, they called the police, requesting that Gray, a "section 12 patient," be "picked up and brought back."[32] Thomas Cummings ("Officer Cummings"), a police officer of the Athol Police Department, responded to the request and quickly located Gray.[33]

Despite Officer Cummings' repeated requests that Gray return to the hospital, she refused to comply with his demands.[34] A physical confrontation ensued once Gray turned and approached Officer Cummings with clenched fists.[35] As a result, Officer Cummings "took [Gray] to the ground" and

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[29] *Id.* The Supreme Court attempted to clarify this issue in 2015 when it granted certiorari in *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). In its petition for certiorari, San Francisco requested that the Court determine "whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA." *Id.* at 1772. Once certiorari had been granted, however, San Francisco declined to raise this issue before the Court, instead conceding that the actions of police officers in arresting disabled individuals fall under Title II of the ADA. *Id.* at 1778–79 (Scalia, J., dissenting). As a result, the Court declined to address this question, dismissing it as "improvidently granted." *Id.* at 1769 (majority opinion). Notably, in 2018, the Supreme Court was presented with another opportunity to answer the very same question. Petition for Writ of Certiorari, at i, City of Newport Beach v. Vos, 139 S. Ct. 2613 (2019), No. 18–672. In *Vos v. City of Newport Beach*, the Ninth Circuit reversed the district court's grant of summary judgment in favor of the city on the ADA claim, holding that the officers in question had time to employ the accommodations proposed by Vos. 892 F.3d 1024, 1037 (9th Cir. 2018). The city petitioned for a writ of certiorari, asking the Supreme Court to clarify which accommodations, if any, are required under Title II of the ADA where exigent circumstances are present. *See* Petition for Writ of Certiorari, *Newport Beach*, 139 S. Ct. 2613 (No. 18–672). On May 20, 2019, however, the petition was denied. *Newport Beach*, 139 S. Ct. 2613.

[30] *Gray*, 917 F.3d at 5–6.

[31] *Id.* at 6; *see also* MASS. GEN. LAWS ch. 123, § 12 (authorizing involuntary "[e]mergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness").

[32] *Gray*, 917 F.3d at 6.

[33] *Id.* Officer Cummings located Gray less than a quarter mile from the hospital walking barefoot along the sidewalk. *Id.*

[34] *Id*. When Officer Cummings pleaded with Gray to return to the hospital, she responded with profanity. *Id.*

[35] *Id.*

instructed her to place her hands behind her back.[36] When she did not obey his order, he warned her that she would be tased.[37] Gray's continued defiance led Officer Cummings to place the Taser in "drive stun" mode before tasing her in the back for approximately four to six seconds.[38] At this point, he was able to handcuff Gray, and she was ultimately transported back to the hospital.[39] Although charges were initially filed against Gray for "assault on a police officer, resisting arrest, disturbing the peace, and disorderly conduct," the charges were ultimately dropped.[40]

Shortly thereafter, Gray brought suit against Officer Cummings and the town of Athol, Massachusetts (the "Town") in federal district court, asserting, among other alleged violations, a cause of action under Title II of the ADA against the Town.[41] With respect to the ADA claim, Gray advanced arguments under both the "effects" theory and the "accommodation" theory.[42] First, Gray claimed that the criminal charges previously filed against her, including resisting arrest and disorderly conduct, served as evidence that Officer Cummings misperceived her failure to comply as criminal activity, rather than as a result of her disability.[43] Second, Gray argued that Officer Cummings should have accommodated her disability by, for example, waiting for the assistance of an ambulance or mental health professional.[44]

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[36] *Id.* Notably, there was a substantial size differential between Officer Cummings and Gray – Officer Cummings was six feet, three inches tall and weighed 215 pounds, while Gray was five feet, ten inches tall and weighed 140 pounds. *Id.*

[37] *Id.* Indeed, rather than heed Officer Cummings' warning, Gray "tucked her arms underneath her chest and flex[ed] tightly." *Id.*

[38] *Id.* at 6–7. "Drive stun" mode is a less painful mode that causes temporary, localized pain rather than "neuromuscular incapacitation." Brief for The Defendants – Appellees, Thomas A. Cummings; Town of Athol, Massachusetts at 8, Gray v. Cummings, 917 F.3d 1 (2018) (No. 18-1303) [hereinafter Brief of Defendants]. As a result, however, Gray suffered "significant pain" and "passed out." Brief for Plaintiff-Appellant Judith Gray at 15, Gray v. Cummings, 917 F.3d 1 (2018) (No. 18-1303) [hereinafter Brief of Plaintiff-Appellant].

[39] *Gray*, 917 F.3d at 7.

[40] *Id.*

[41] *Id.* Gray also brought state-law claims for assault and battery, malicious prosecution, and violations of the Massachusetts Civil Rights Act, as well as two separate causes of action under 42 U.S.C § 1983 against both the Town and Officer Cummings. *Id.* at 8. Gray's section 1983 claim against Officer Cummings asserted that Officer Cummings used excessive force during her arrest and, as a result, violated her Fourth Amendment rights. *Id.* In her section 1983 claim against the Town, Gray alleged that the Town violated her Fourth Amendment rights by inadequately training its offers to appropriately interact with those suffering from mental illness. *Id.* at 13–14.

[42] *Id.* at 15.

[43] *Id.* at 15–16.

[44] *Id.* at 16. Although Officer Cummings requested backup, he did not wait for it to arrive. Brief of Plaintiff-Appellant, *supra* note 38, at 6.

Following discovery, Officer Cummings and the Town moved for summary judgment, the consideration of which was referred to a magistrate judge.[45] The magistrate judge concluded that Officer Cummings did not violate the ADA because, despite Gray's disability, he had employed an "appropriate level of force in response to an ongoing threat."[46] The district court adopted the magistrate judge's recommendation as it pertained to the ADA claim in full.[47] Gray appealed the district court's decision to the United States Court of Appeals for the First Circuit.[48]

II. WHETHER, AND TO WHAT EXTENT, TITLE II APPLIES TO ARRESTS

Although no circuit has found Title II of the ADA to be entirely inapplicable to arrests, courts are divided on one significant issue – the extent to which Title II applies to arrests.[49] As a result, an individual bringing an ADA claim in one jurisdiction may effectively be barred from bringing the same claim in another.[50]

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[45] *Gray*, 917 F.3d at 7.

[46] *Id.* Additionally, the magistrate judge found no violation of the Fourth Amendment on the part of either Officer Cummings or the Town, recommending summary judgment in favor of both Defendants on the section 1983 claim. *Id.* Specifically, with regard to the claim against Officer Cummings, the magistrate judge found that, as a matter of law, "the single deployment of a taser in drive stun mode," given the circumstances at hand, was reasonable. *Id.* at 8. Moreover, the magistrate judge determined that, even if there was a constitutional violation, Officer Cummings was entitled to qualified immunity because he did not violate a clearly established right. Gray v. Cummings, No. 15-10276-TSH, 2017 WL 8942566, at *7 (Mass. Dist. Ct. 2017). Indeed, to successfully raise a qualified immunity defense, a defendant must demonstrate that the allegedly violated constitutional right was "clearly established" at the time of the violation, thus providing the defendant with fair notice that his conduct was unconstitutional. *Id.* at *7. Here, the magistrate judge concluded that "a reasonable officer in Cummings's position would not have understood that using a taser in the circumstances of this case was unlawful" and, therefore, that the "contours of the constitutional right was not sufficiently clear." *Id.* at *9. Finally, because a constitutional violation on the part of one of the Town's officers is required in order to hold a town liable for failure to train under section 1983, and the magistrate judge found that Officer Cummings did not violate the Constitution, the magistrate judge recommended granting the Town's motion for summary judgment. *Id.* The district court adopted the magistrate judge's recommendation in full, however it declined to address the magistrate judge's finding that "Cummings employed reasonable force under all of the circumstances," because it agreed that "the right not to be tased while offering non-violent, stationary, resistance to a lawful seizure was not dearly established at the time of the confrontation between . . . Gray and . . . Cummings." *Gray*, 917 F.3d at 7; Gray v. Cummings, 4:15-CV-10276, 2018 WL 1956872, at *1 (Mass. Dist. Ct. 2018).

[47] *See generally* Gray, 2018 WL 1956872, at *1 (adopting the Report and Recommendation of the magistrate judge).

[48] *Gray*, 917 F.3d at 7.

[49] *Id.* at 16–17.

[50] Levin, *supra* note 27, at 272–73.

Section A of this Part explains the approach adopted in *Hainze v. Richards* in which the Fifth Circuit held that exigent circumstances serve as a bar to Title II claims.[51] Section B describes the approach embraced by the Ninth and the Eleventh Circuits, among others, which consider exigent circumstances only when analyzing the reasonableness of a proposed accommodation.[52] Part C explores the First Circuit's reluctance to adopt either approach in light of the aforementioned circuit split.[53]

A. Exigent Circumstances as a Bar to Title II Claims

In *Hainze v. Richards*, the Fifth Circuit adopted a unique approach for determining if and when Title II of the ADA applies to police encounters.[54] In *Hainze*, a woman requested that the police bring her nephew, Kim Michael Hainze, who had a history of depression, to the hospital for mental health treatment.[55] She indicated that Hainze was currently under the influence of alcohol and antidepressants and was threatening to commit suicide or "suicide by cop."[56] The officers located Hainze standing by the passenger door of a pickup truck carrying a knife.[57] He approached the officers and, when he ignored their commands to stop, they fired two shots into his chest.[58]

Having survived his gunshot wounds, Hainze brought a claim against the county, as well as one of its officers, for relief under Title II of the ADA.[59] Specifically, he claimed that the county failed to reasonably accommodate his disability by failing to adopt a policy that provided protection for individuals experiencing mental health crises, thus resulting in discriminatory treatment.[60]

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[51] *See infra* notes 55–63 and accompanying text.

[52] *See infra* notes 64–79 and accompanying text.

[53] *See infra* notes 80–83 and accompanying text.

[54] *See* Gray v. Cummings, 917 F.3d 1, 16 (1st Cir. 2019) (noting that other courts have taken a different approach from that of the Fifth Circuit).

[55] Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000).

[56] *Id.* "Suicide by cop" occurs when an individual commits suicide by provoking police officers to use deadly force. *Id.* at n.1.

[57] *Id.*

[58] *Id.* The shots were fired when Hainze was approximately four to six feet from the officers. *Id.* The entire encounter, from the time the officers located Hainze until the moment he was shot, lasted approximately twenty seconds. *Id.*

[59] *Id.* at 797–98.

[60] *Id.* at 801. Hainze also claimed that he was denied the benefits of the mental health training provided to the county's officers when, despite his training, the officer used deadly force to restrain him. *Id.* at 800. Emphasizing that in order to successfully state a claim under Title II an individual must be denied the benefits of a public entity's "services, programs, or activities" *by* the public entity, the Fifth Circuit rejected this claim, finding instead that it was Hainze's assault on the officer with a deadly weapon that resulted in him failing to receive the benefits of that program. *Id.*

The Fifth Circuit disagreed, concluding that Title II does not apply to ad hoc police encounters, irrespective of whether the encounter involves a disabled individual, before the officer has secured the scene and ensured that no threat to human life exists.[61] As such, the Fifth Circuit implemented a bright-line rule, effectively holding that exigent circumstances serve as a complete bar to Title II claims.[62] Stated another way, where exigent circumstances are present, the reasonable accommodation of an individual's disability is not required.[63]

B. Exigent Circumstances as a Factor in Determining the Reasonableness of an Accommodation

Alternatively, other courts have held that Title II applies without exception to ad hoc police encounters, including arrests.[64] These courts have found that exigent circumstances do not bar Title II claims, but rather impact the consideration of the reasonableness of any proposed accommodation.[65]

In *Bircoll v. Miami-Dade County*, for example, Steven Bircoll, who had no hearing in his left ear and only ten percent hearing in his right, was pulled over for a traffic stop.[66] When Bircoll stepped out of his car, the officer

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[61] *Id.* at 801. Law enforcement officials, the Fifth Circuit reasoned, should not have to consider ADA compliance when exigent circumstances are present, as doing so would endanger the public. *Id.* Requiring officers to stop to consider other courses of action while making split-second decisions, the Fifth Circuit held, "is [not] the type of 'reasonable accommodation' contemplated by Title II." *Id.* at 801–02.

[62] *Id.* at 801; *see also* Levin, *supra* note 27, at 286 (construing the Fifth Circuit's approach to exigent circumstances as a complete bar to ADA claims).

[63] *See Hainze*, 207 F.3d at 801–02; *see also* Lefkowitz, *supra* note 20, at 725 (noting that the "Hainze Approach is the only approach that renders Title II completely inapplicable in certain situations"); Levin, *supra* note 27, at 286 (stating that, under the *Hainze* approach, reasonable accommodations are not required before the scene is secure and no threat to human life exists).

[64] *See Gray*, 917 F.3d at 16 (noting that other courts have "chartered a different course" from that of the Fifth Circuit).

[65] *See, e.g.*, Sheehan v. City & Cty. of San Francisco, 743 F.3d 1211, 1215 (9th Cir. 2014), *rev'd in part and cert. dismissed in part by* 135 S. Ct. 1765 (2015) (holding that "exigent circumstances inform the reasonableness analysis under the ADA"); Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1085 (11th Cir. 2007) (concluding that "exigent circumstances presented by criminal activity . . . go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance"). Similarly, in *Seremeth v. Board of County Commissioners Frederick County*, the Fourth Circuit held that "the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation." 673 F.3d 333, 339 (4th Cir. 2012). Deciding what constitutes a reasonable accommodation, the Fourth Circuit declared, is a "question of fact" that will "vary according to the circumstances." *Id.* at 340.

[66] *Bircoll*, 480 F.3d at 1075–76.

smelled alcohol and began to administer field sobriety tests.[67] After the fourth test, the officer arrested Bircoll for driving under the influence.[68]

Subsequently, Bircoll filed a lawsuit alleging that the county violated Title II of the ADA by failing to provide him with auxiliary aids, such as an oral interpreter, that would have allowed him to effectively communicate with the officers during the field sobriety tests and eventual arrest.[69] The Eleventh Circuit held that the applicability of the ADA was not in question, as Title II clearly prohibits discrimination by a public entity on the basis of disability, but rather whether any modification to police procedure is reasonable given the exigent circumstances.[70] As such, the Eleventh Circuit found that, in light of the serious public safety concerns involving a DUI stop on the side of a highway, waiting for an oral interpreter before administering a field sobriety test is not a reasonable modification to police procedure.[71]

Similarly, in *Sheehan v. City & County of San Francisco*, police officers visited Teresa Sheehan, who suffered from mental illness, after her social worker became concerned for her wellbeing.[72] When the officers arrived at her home, she grabbed a knife and threatened to kill the officers, causing them to retreat to the hallway.[73] After calling for backup, the officers drew their weapons and reentered the room.[74] When Sheehan threatened the officers once again, they shot her approximately five to six times.[75]

Surviving the encounter, Sheehan brought an action against the officers and the city, asserting violations of Title II of the ADA.[76] Specifically, she alleged that the officers failed to accommodate her disability when they forced their way back into her room, rather than attempting to defuse the

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[67] *Id.* at 1076.

[68] *Id.* at 1078.

[69] *Id.* at 1085.

[70] *Id.* This question, which the Eleventh Circuit referred to as the "reasonable-modification inquiry," is "highly fact-specific" and therefore must be decided on a "case-by-case" basis. *Id.* at 1085–86.

[71] *Id.* at 1086.

[72] *Sheehan*, 743 F.3d at 1215. Although in *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015), the Supreme Court reversed the Ninth Circuit's holding in *Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211 (9th Cir. 2014), as it pertained to qualified immunity, it did not address the question of Title II's application to the arrest of an "armed, violent, and mentally ill suspect." 135 S. Ct. at 1772–73. As such, the Ninth Circuit's holding regarding the scope of Title II's application to arrests remains binding precedent. *Id.*; *see also* Levin, *supra* note 27, at 292 (noting that "the *Sheehan* ADA finding remains good law in the Ninth Circuit").

[73] *Sheehan*, 743 F.3d at 1215.

[74] *Id.* at 1215–16.

[75] *Id.* at 1216.

[76] *Id.*

situation.[77] In considering the extent to which Title II applies to arrests, the Ninth Circuit expressly declined to adopt the Fifth Circuit's approach, holding instead that "exigent circumstances inform the reasonableness analysis under the ADA."[78] Applying this rule to the facts at hand, the Ninth Circuit denied the city's motion for summary judgment, concluding that a reasonable jury could find that, once the officers had retreated from Sheehan's room, the situation had been sufficiently defused so as to give the officers ample time to provide the accommodations Sheehan demanded.[79]

C. The First Circuit Joins the Discussion

In order to adjudicate Gray's claim under Title II of the ADA, the First Circuit in *Gray v. Cummings* was asked to determine whether, and to what extent, Title II applies to ad hoc police encounters.[80] The First Circuit expressly declined to "plunge headlong into these murky waters," simply assuming, for the purpose of adjudicating the claim on narrower grounds, that Title II of the ADA applies to ad hoc police encounters and that exigent circumstances should be considered when assessing the reasonableness of the officer's actions, thus applying the approach embraced by the Ninth and Eleventh Circuits.[81] Nevertheless, the First Circuit affirmed the district court's grant of summary judgment in favor of the Town on Gray's ADA claim, holding that Gray failed to demonstrate a genuine issue of material fact as to the officer's deliberate indifference to the risk of violating the ADA, an element necessary for obtaining monetary damages.[82]

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[77] *Id.* at 1232–33. Specifically, the plaintiff claims that the officers should have "respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id.* at 1233.

[78] *Id.* at 1232.

[79] *Id.* at 1233.

[80] *Gray*, 917 F.3d at 16.

[81] *Id.* at 17. The First Circuit chose to assume that Title II of the ADA applies to ad hoc police encounters, and that exigent circumstances speak to the reasonableness of an officer's conduct, as this approach was most favorable to Gray. *See id.* In doing so, the Court reaffirmed the principle that "courts should not rush to decide unsettled legal issues that can easily be avoided." *Id.* at 18 (quoting United States v. Gonzalez, 736 F.3d 40, 40 (1st Cir. 2013)).

[82] *Id.* at 18–19. In order to be eligible for monetary damages on a Title II claim, a plaintiff must demonstrate "intentional discrimination" on the part of the public entity. *Id.* at 17. While other courts have held that a showing of "deliberate indifference" may be sufficient to meet this element, the First Circuit has not so held. *Id.* Rather than do so here, the First Circuit assumed, favorably to Gray, that "deliberate indifference" was the appropriate standard. *Id.* As such, to prevail on the "effects" theory claim, Gray would have had to demonstrate that Cummings knew that her refusal to comply with his demands was a symptom of her disability. *Id.* at 18. Similarly, to prevail on the

III. THE FIRST CIRCUIT SHOULD HAVE REJECTED THE FIFTH CIRCUIT'S APPROACH IN FAVOR OF THE MAJORITY APPROACH

[omitted]

CONCLUSION

[omitted]

"accommodation" theory, Gray would have to show that Cummings knew he was required to provide a reasonable accommodation. *Id.* Gray, the First Circuit reasoned, failed to make either showing. *Id.*

Applicant Details

First Name	**Matthew**
Middle Initial	**D**
Last Name	**Kaminer**
Citizenship Status	**U. S. Citizen**
Email Address	**kaminer.m22@law.wlu.edu**
Address	**Address** Street **1291 Seawane Drive** City **Hewlett** State/Territory **New York** Zip **11557** Country **United States**
Contact Phone Number	**5165216620**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/ BS	**May 2018**
JD/LLB From	**Washington and Lee University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=54704&yr=2009**
Date of JD/ LLB	**May 1, 2022**
Class Rank	**20%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington and Lee Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Finalist, 2021 Robert J. Grey Jr. Negotiations Competition**

National 2nd Place Brief, 2021 ABA National Appellate Advocacy Competition
Quarterfinalist (oral advocacy & brief-writing), 2021 Global Antitrust Institute Invitational
National Quarterfinalist (team oral advocacy & brief-writing) - 2021 ABA National Appellate Advocacy Competition
Winner--Best Brief, 2020 John W. Davis Appellate Advocacy Competition

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Professional Organization

Organizations **Just The Beginning Organization**

Recommenders

Shaughnessy, Joan
shaughnessyj@wlu.edu
540-458-8512
Maller-Stein, Rebecca
Rebecca.maller@law.Cardozo.yu.edu
(610) 574-3787
Russell, Christopher
cbrussell@vacourts.gov

References

Hon. Christopher B. Russell
Circuit Judge, Rockbridge County Circuit Court
Phone: (540) 463-4758
Email: cbrussell@vacourts.gov

Rebecca Maller-Stein
Law Clerk to Judge Jon O. Newman, United States Court of Appeals for the Second Circuit
Phone: (610) 574-3787
Email: Maller.rebecca@gmail.com

Alan M. Trammell
Associate Professor of Law, Washington and Lee University School of Law
Phone: (202) 215-5134
Email: atrammell@wlu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MATTHEW KAMINER

8 North Main Street, Apt. B, Lexington, VA 24450 | Kaminer.M22@law.wlu.edu | 516.521.6620

June 9, 2021

The Honorable Elizabeth W. Hanes
U.S. Magistrate Judge
Eastern District of Virginia
701 East Broad Street, 5th Floor
Richmond, VA 23219

Judge Hanes,

I am a rising third-year student at Washington & Lee University School of Law, and I am writing to apply for a two-year clerkship in your chambers beginning in August 2022. I have been fortunate to visit Richmond several times during my W&L undergraduate and law school years and have always thoroughly enjoyed my experiences there. It would be my honor to return to Richmond full-time as one of your law clerks.

My extracurricular pursuits while in law school have equipped me with the skills I would need to excel as your law clerk. I first became interested in clerking during the summer after my first year of law school while interning for the late Judge Paul G. Feinman of the New York Court of Appeals. As Judge Feinman's intern, I prepared memoranda and bench reports on civil and criminal matters pending before the Court. For one appeal, my bench report was Judge Feinman's primary reference document, and my recommendation aligned with Judge Feinman's vote and ultimately the majority of the Court. The experience not only sharpened my research and writing skills, but also reassured me that I have the drive and aptitude necessary to be an effective judicial clerk. I channeled that reassurance during my second year of law school, when I won W&L's moot court competition and later received the National Second-Place Brief award in the American Bar Association's national competition. Moreover, my student Note for the *Washington and Lee Law Review*—which analyzes theories of corporate consent to general personal jurisdiction—was selected for publication. The excitement I get from these intellectual challenges assures me that I would bring enthusiasm and eagerness to every day of work as your law clerk.

The experience I expect to have by August 2022 would make me an asset in your chambers. I recently joined the summer associate program at DLA Piper, which I know will only further my development. In my third year at W&L, I will work with the U.S. Attorney's Office for the Western District of Virginia, where I will try cases as first chair in Magistrate's Court. On a personal level, my time as an NCAA wrestler taught me to embrace responsibility, appreciate criticism, and always do the little things right. Those qualities would define my time as your law clerk.

I would greatly appreciate any opportunity to speak with you and am always available for an interview. Please feel free to contact me at any time. Thank you for your consideration.

Sincerely,

Matthew Kaminer

MATTHEW KAMINER

1291 Seawane Drive, Hewlett, NY 11557 | Kaminer.M22@law.wlu.edu | 516.521.6620

EDUCATION

Washington and Lee University School of Law, Lexington, VA
J.D. Candidate, Class of 2022

- **GPA: 3.737** (top 20%)
- **Lead Online Editor, *Washington & Lee Law Review***
  - Matthew D. Kaminer, *The Cost of Doing Business? Corporate Registration as a Valid Basis for Consent to General Jurisdiction*, 79 WASH & LEE L. REV ONLINE (forthcoming 2021).
- **2nd-Place Brief, 2021 ABA National Appellate Advocacy Competition**
  - Issue: What is the standard for whether the law is "clearly established" for purposes of qualified immunity?
- **Best Brief, 2020 John W. Davis Appellate Advocacy Competition**
  - Issue: Does 18 U.S.C. § 1114 apply to conduct occurring outside the United States?
- **Burks Scholar** (teaching assistant to first-year legal writing course)
- **Kirgis Fellow** (peer mentor to first-year students; advising on academics, job search, and adjusting to law school)
- **Volunteer Assistant Coach, NCAA Division III Wrestling Team**
- **Hearing Advisor** (counsel students accused of honor violations in disciplinary hearings)

Washington and Lee University, Lexington, VA
B.A., Business Journalism, 2018

- **Captain, NCAA Wrestling Team** (*4th-most wins in school history; 2017 Team MVP award*)
- **Dean's List; Scholar All-American award recipient**
- **Donald W. Reynolds Business Journalism Scholarship award recipient**

WORK EXPERIENCE

U.S. Attorney's Office, Western District of Virginia, Roanoke, VA
Law Student Volunteer (incoming), August 2021–May 2022

DLA Piper, New York, NY
Summer Associate (incoming), May 2021–July 2021

Rockbridge County Circuit Court, Hon. Christopher B. Russell, Lexington, VA
Judicial Extern, August 2020–April 2021

- Drafted bench memoranda on pretrial issues; observed jury trials, motions hearings, and sentencings
- Wrote letter opinion on motion to withdraw and amend default responses to requests for admissions

New York Court of Appeals, Hon. Paul G. Feinman, New York, NY
Judicial Intern, May 2020–August 2020

- Conducted legal research and drafted bench reports for pending appeals and criminal leave applications

Nussbaum Law Group, New York, NY
Paralegal, September 2018–July 2019

- Provided litigation support for plaintiffs' antitrust practice—including discovery management, drafting deposition outlines, cite-checking, and both fact and legal research

The Charlotte Observer, Charlotte, NC
Business News Intern, May 2017–July 2017

- Reported on business and financial news stories; work republished by *U.S. News & World Report* and *AP*

INTERESTS

- **Wrestling** (coaching youth, high school, and NCAA wrestlers, as well as professional fighters)
- **Social impact** (volunteer work with Crisis Text Line and The Posse Foundation)
- **High-performance psychology** (favorite book: *Artist of Life* by Bruce Lee)

WASHINGTON AND LEE UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
Lexington, Virginia 24450-2116
540.458.8455

Student's Name: Mr. Matthew David Kaminer
Kaminer, Matthew David
Entered: 09/11/2014 as UGR:1ST-TIME 1ST-YR
Major: Journalism

Date Produced: 06/03/2021
Current Program: Law Class: 2022
Current Status: On Campus
Other Ed: GEORGE W HEWLETT HS Hewlett NY 11557
HOFSTRA UNIV Hempstead NY 11550
BA WASHINGTON AND LEE UNIVERSITY Lexington VA 24450

SSN: ***-**-2683
Student ID: 1722200
Birthdate: 07/25/****

COURSE			ATT	COM	GRADE	POINTS
LAW-FALL SEMESTER 2017-18						
LAW	263	DEATH PENALTY	2.0	2.0	P	0.00
Term	Cmpl Cr: 2.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Cumul	Cmpl Cr: 2.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
LAW-FALL SEMESTER 2019-20						
LAW	109	CIVIL PROCEDURE	4.0	4.0	A	16.00
LAW	140	CONTRACTS	4.0	4.0	A-	14.68
LAW	163	LEGAL RESEARCH	0.5	0.5	B+	1.67
LAW	165	LEGAL WRITING I	2.0	2.0	A-	7.34
LAW	190	TORTS	4.0	4.0	B+	13.32
Term	Cmpl Cr: 14.5	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
Cumul	Cmpl Cr: 16.5	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		

The COVID-19 pandemic required significant academic changes.
Unusual enrollment patterns and grading reflect the disruption
of the time, not necessarily the student's work.

LAW-SPRING SEMESTER 2019-20						
LAW	130	CONSTITUTIONAL LAW	4.0	4.0	CR	0.00
LAW	150	CRIMINAL LAW	3.0	3.0	CR	0.00
LAW	163	LEGAL RESEARCH	0.5	0.5	CR	0.00
LAW	166	LEGAL WRITING II	2.0	2.0	CR	0.00
LAW	179	PROPERTY	4.0	4.0	CR	0.00
LAW	195	TRANSNATIONAL LAW	3.0	3.0	CR	0.00
Term	Cmpl Cr: 16.5	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Year	Cmpl Cr: 31.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
Cumul	Cmpl Cr: 33.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
LAW-SUMMER 2020-21 SUMMER SCHOOL						
LAW	888	SUMMER INTERNSHIP		1.0	CR	
Term	Cmpl Cr: 1.0	GPA Pts: 0.00	GPA Cr: 0.0	GPA: 0.000		
Cumul	Cmpl Cr: 34.0	GPA Pts: 53.01	GPA Cr: 14.5	GPA: 3.656		
LAW-FALL SEMESTER 2020-21						
LAW	270	EMPLOYMENT PRACTICES	3.0	3.0	B	9.00
LAW	285	EVIDENCE	3.0	3.0	A	12.00
LAW	394P	PATENT LITIGATION PRACTICUM	5.0	5.0	A-	18.35
LAW	511	LAW REVIEW	2.0	2.0	CR	0.00
LAW	534	JUDICIAL EXTERN: STATE	2.0	2.0	A	8.00
LAW	534F	JUDICIAL EXTERN:STATE-FDPLC	2.0	2.0	P	0.00
Term	Cmpl Cr: 17.0	GPA Pts: 47.35	GPA Cr: 13.0	GPA: 3.642		
Cumul	Cmpl Cr: 51.0	GPA Pts: 100.36	GPA Cr: 27.5	GPA: 3.649		

(continued in next column)

COURSE			ATT	COM	GRADE	POINTS
LAW-SPRING SEMESTER 2020-21						
LAW	225	CONFLICT OF LAWS	3.0	3.0	A	12.00
LAW	234P	COMPLEX LITIGATION PRACTICUM	4.0	4.0	A	16.00
LAW	267	ELECTRONIC DISCOVERY	1.0	1.0	A-	3.67
LAW	390	PROFESSIONAL RESPONSIBILITY	3.0	3.0	A	12.00
LAW	511	LAW REVIEW	2.0	2.0	CR	0.00
LAW	534	JUDICIAL EXTERN: STATE	2.0	2.0	A-	7.34
LAW	534F	JUDICIAL EXTERN:STATE-FD.PLCMT	2.0	2.0	P	0.00
Term	Cmpl Cr: 17.0	GPA Pts: 51.01	GPA Cr: 13.0	GPA: 3.924		
Year	Cmpl Cr: 34.0	GPA Pts: 98.36	GPA Cr: 26.0	GPA: 3.783		
Cumul	Cmpl Cr: 68.0	GPA Pts: 151.37	GPA Cr: 40.5	GPA: 3.738		

***** END OF TRANSCRIPT *****

LAW-FALL SEMESTER 2021-22 CURRENT OR FUTURE REGISTRATION				
LAW	215	ANTITRUST LAW	2.0	
LAW	240P	CONSUMER PROTECTION LAW PRACT	3.0	
LAW	300	FED JURISDICTION & PROCEDURE	3.0	
LAW	407	SKILLS IMMERSION - LITIGATION	2.0	
LAW	414	SECURED TRANSACTIONS	3.0	
LAW	428P	TRIAL ADVOCACY PRACTICUM	3.0	

Registr

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend one of my students, Matt Kaminer, for a position as one of your judicial clerks. I have known Matt since the fall of his first year, when he was a student in my Civil Procedure class. Matt has the character, experience, and ability to be an excellent clerk. I recommend him without reservation.

Matt has done very well here academically. He stands in the top quarter of his class and is a member of our Law Review. His note is on a procedure topic. He is discussing whether state business registration statutes can be used as a means of obtaining consensual general personal jurisdiction over corporations. Matt also wrote the best brief in our John W. Davis Appellate Advocacy Competition. He did an excellent job in my Civil Procedure class. He was always exceptionally well prepared for class and his comments and questions in class were on point and insightful. He wrote one of the very best exams that I received last year.

Matt is interested in pursuing a career as a litigator. His focus on that goal is clear both in his academic choices and in the work experiences he has pursued. He interned for the Rockbridge County Circuit Court and for the New York Court of Appeals. During the next academic year, he will be a legal extern in our local U. S. Attorney's Office. He has enrolled in almost all of the litigation electives that we offer. His experiences will serve him well in his role as a judicial clerk.

Finally and most importantly, Matt is a man of sterling character. He is honest, hardworking, and generous. As both an undergraduate and a law student, Matt spent long hours volunteering with our honor system – first as a member of the Executive Committee and more recently as a hearing advisor. You can trust Matt to serve faithfully and wholeheartedly.

I recommend Matt enthusiastically. If you have any questions, I would be happy to talk further about Matt's qualifications.

Very truly yours,

Joan M. Shaughnessy
Roger D. Groot Professor of Law

Joan Shaughnessy - shaughnessyj@wlu.edu - 540-458-8512

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to enthusiastically recommend Matthew Kaminer to be a law clerk in your chambers. I supervised Matt when he served as a judicial intern for the Hon. Paul G. Feinman at the New York Court of Appeals during the summer of 2020 while I served as a law clerk for Judge Feinman. I currently serve as a law clerk for the Hon. Jon O. Newman at the U.S. Court of Appeals for the Second Circuit, and am writing this letter in support of Matt's candidacy due to Judge Feinman's untimely passing earlier this year.

During his remote internship with our chambers, Matt distinguished himself as the best of our summer interns during an unprecedented and difficult time. He demonstrated methodical research skills, concise writing, and superb legal analysis. He handled a diverse array of legal issues and tasks, including conducting research and drafting bench memoranda on pending criminal and civil appeals before the Court and criminal applications for leave to appeal. He also delivered impressive oral presentations to the judge and the other law clerks and was adept at concisely articulating his legal analysis and addressing our many questions about the appeals. Among Matt's several valuable contributions to chambers was his bench memorandum on a pending appeal involving a complicated criminal procedure and statutory interpretation issue. Matt deftly and thoroughly analyzed and summarized the parties' arguments and governing case law, and anticipated both Judge Feinman's vote in the case and ultimately the Court's prevailing resolution. When assigning Matt to the appeal, I had planned to incorporate his analysis into my own bench memorandum but was so impressed by his detailed and exhaustive work product that I instructed him to send his memorandum directly to Judge Feinman to serve as the judge's primary preparation document.

In short, Matt is bright, curious, enthusiastic, and hard-working, and would be an asset to any chambers. During an unprecedented change in summer plans, he showed uncharacteristic maturity and grace. I was particularly impressed by how he efficiently and independently handled the work assigned and proactively sought out additional assignments and feedback from myself and the other law clerks to improve upon his already impressive skill-set and maximize his time with chambers. Matt was a pleasure to have in chambers, and I recommend him to be a full-time law clerk without reservation. Please feel free to contact me at maller.rebecca@gmail.com or (610) 574-3787 if I can provide you with anything further.

Sincerely,

Rebecca Maller-Stein

Commonwealth of Virginia

JUDGES
TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

W. CHAPMAN GOODWIN, CHIEF JUDGE
JOEL R. BRANSCOM
PAUL A. DRYER
ANNE M. REED
CHRISTOPHER B. RUSSELL
EDWARD K. STEIN

ROCKBRIDGE/BUENA VISTA JUDGE'S CHAMBERS
20 SOUTH RANDOLPH STREET, SUITE 300
LEXINGTON, VIRGINIA 24450
(540) 463-4758

CIRCUIT COURTS OF
COUNTY OF ALLEGHANY
COUNTY OF AUGUSTA
COUNTY OF BATH
COUNTY OF BOTETOURT
COUNTY OF CRAIG
COUNTY OF HIGHLAND
COUNTY OF ROCKBRIDGE
CITY OF BUENA VISTA
CITY OF STAUNTON
CITY OF WAYNESBORO

March 23, 2021

To whom it may concern:

Re: Matthew D. Kaminer

It is my pleasure to recommend Matt Kaminer for a clerkship with your office. The opinions expressed herein are personal and not an opinion of this Court. Matt is currently a second-year law student at Washington and Lee University, and he has worked as a student extern in my chambers in Lexington since August 2020.

Matt's work product as a judicial extern is excellent. His work for this court includes legal research and writing, correspondence with counsel of record in pending cases, and court observation. He did an outstanding job drafting a letter opinion in a case involving a complicated discovery dispute intertwined with a motion for summary judgment. The assignment required statutory and case law research and lengthy discussions in chambers. His legal analysis in the matter was excellent and his writing was polished and extremely useful to the court.

Having previously served as clerk for a Virginia Circuit Court judge and as an adjunct professor of law at Washington and Lee, I have worked with and observed many law students and recent law graduates. I know from experience that most extern positions are for third-year students. It is notable that Matt stepped into this position at the beginning of his second year. His skills and competence are equal to those of a law school graduate.

Matt is mature, diligent, and insightful. He is professional in his appearance and in his interactions with the Court staff and members of the Bar. Above all, Matt is a delightful person to work with. I have enjoyed speaking with him about his impression of cases that come before this court. I recommend him without reservation, and I thank you for your attention to my comments. Please do not hesitate to contact me if any additional information would be helpful.

Sincerely yours,

Christopher B. Russell

Writing Sample: Memorandum Opinion for Rockbridge County Circuit Court

This writing sample is a memorandum opinion on a motion for summary judgment and motion to withdraw default responses to requests for admissions. I drafted this opinion for Judge Christopher Russell during my externship in the Rockbridge County Circuit Court. This was the draft opinion I sent to Judge Russell and has not been edited by others.

This personal injury case concerned an explosion at a convenience store. A technician servicing the store on behalf of the defendant—a propane gas company—allegedly forgot to turn off the pilot lights in a grill, resulting in the explosion that injured the plaintiff. During discovery, the plaintiff failed to respond to several requests for admissions in the time period required by the Rules of the Supreme Court of Virginia. The defendant moved for summary judgment based on the default admissions, and the plaintiff then moved to withdraw and amend the default admissions. These motions were the subject of this memorandum opinion.

In the interest of anonymity, all names of businesses or natural persons were replaced either with pseudonyms or brackets.

Matthew Kaminer

2022 J.D. Candidate | Washington and Lee University School of Law

Re: **[Caption removed]**

Dear Counsel:

On [hearing date], the parties appeared, by counsel, for argument on two motions: Plaintiff's Motion to Withdraw and Amend Default Responses to Defendants' Requests for Admissions, and Defendants' Motion for Summary Judgment.

Background

This case arises from an incident on January 31, 2017 at the [convenience store] in Rockbridge County. The Complaint alleges that Plaintiff was injured in an explosion as a proximate result of the negligence of [Propane Gas Company] and John Doe, a [Propane Gas Company] technician.

Plaintiff initially filed suit, through his prior counsel, on December 21, 2018. Discovery commenced, including interrogatories, requests for production, and depositions. That case was non-suited by order of this Court on January 16, 2020. Plaintiff, proceeding *pro se*, filed this action on July 2, 2020. Defendants filed their Answer on August 13, 2020.

Defendants again propounded discovery requests. Requests for Admissions were sent by email to Plaintiff and were mailed to Plaintiff's home address by U.S. Mail. These Requests asked Plaintiff to admit, among other things, that he had no evidence of how or why the incident occurred or whether it was caused by any negligence on the part of [Propane Gas Company]. On the morning of August 18, 2020, while the Requests were pending, Plaintiff and counsel for Defendants exchanged email correspondence regarding the possibility of mediation through the Judicial Conference Settlement Program. Later that afternoon, counsel for Defendants sent a follow-up email advising Plaintiff that the Requests for Admissions would be formally served on him via process server if he did not agree to electronic service, and that he would have 21 days to respond. On September 16, 2020, the Requests were served via posted service at Plaintiff's home. Plaintiff alleges that he never received any of the mailed, emailed, or posted copies of the Requests.

Defendants filed the Motion for Summary Judgment on December 10, 2020, based in large measure upon Plaintiff's failure to respond to discovery. Defendants provided a copy of the Motion to Plaintiff and to Jane Roe, Esquire. Ms. Roe wrote to the Court that she did not represent Plaintiff and was not counsel of

record for Plaintiff in this case. Plaintiff alleges that he did not receive the Motion at that time, but rather that he first received a copy of the Motion when he was served with a Notice of Hearing on January 7, 2021, with the discovery requests attached as exhibits. Plaintiff alleges that this was the first time he saw the Requests for Admissions.

Shortly thereafter, on January 11, 2021, Plaintiff retained present counsel and filed a Motion to Withdraw and Amend Default Responses to Defendants' Request for Admission, as well as an opposition to Defendants' Motion for Summary Judgment.

Applicable Standards

Virginia Supreme Court Rule 4:11 governs Requests for Admission. The rule aims "to expedite a trial by narrowing the contested facts and issues." Shaheen v. County of Mathews, 265 Va. 462, 475, 579 S.E.2d 162, 170 (2003). Pursuant to Rule 4:11(a), "[e]ach matter of which an admission is requested" is deemed admitted if "the party to whom the request is directed" does not serve "upon the party requesting the admission a written answer or objection addressed to the matter" within 21 days after service of the request.

Further, any matter admitted in response to a request "is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Va. Sup. Ct. R. 4:11(b). The Court may exercise its discretion to permit withdrawal or amendment of default admissions when "the presentation of the merits of the action will be subserved thereby" and "the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits." *Id.* Courts have viewed this requirement as a "two-part test" and the Supreme Court of Virginia recognized it as such in Shaheen. *See* Shaheen, 265 Va. at 473, 579 S.E.2d. at 169 (observing the parameters of 4:11 as a two-part test "which we adopt"); Jay-Ton Const. Co. v. Bowen Const. Servs., 62 Va. Cir. 414, at *4 (Portsmouth City, 2003) (noting "the standard recently adopted by the Virginia Supreme Court in [Shaheen] to determine when to allow withdrawal or amendment of admissions under Rule 4:11").

"Under the first prong of this two-part test, the moving party has the burden to demonstrate that withdrawal or amendment of an admission will subserve the presentation of the merits of the action."

Shaheen, 265 Va. at 473–74, 579 S.E.2d at 169 (internal quotations omitted). "This aspect of the test is satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case." Id. at 474, 579 S.E.2d at 169–70 (internal quotations omitted). Under the second prong, the non-moving party bears the burden of demonstrating "that amendment or withdrawal of an admission will prejudice that party in maintaining the action or a defense." *See* id. at 474, 579 S.E.2d at 170. The prejudice contemplated by the rule "'is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, *e.g.,* caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.'" *See* id. (quoting Brook Village North Assocs. v. General Elec. Co., 686 F.2d 66, 70 (1st Cir. 1982)).

Analysis

The questions to be answered in addressing Plaintiff's Motion are: (1) whether Plaintiff demonstrated that withdrawal and/or amendment of his default admissions would subserve the presentation of the merits in this case; and (2) whether Defendants demonstrated that amendment or withdrawal of Plaintiffs' admissions will prejudice Defendants in maintaining their defense.

As a threshold matter, the Court must note that Plaintiff, in some respect, has mischaracterized the applicable law. In his motion to withdraw and amend his default admissions, Plaintiff emphasized the words of the Shaheen Court; that a trial court's discretion to permit withdrawal or amendment of default admissions under Rule 4:11 "**must be exercised** within such certain parameters" provided in Rule 4:11(b). *See* Pls.' Mot. to Withdraw and Amend Default Resps. to Def.'s Req. for Admiss., at 3 (Jan. 19, 2021) [hereinafter Pls.' Mot to Withdraw and Amend] (emphasis in original) (citing Shaheen, 265 Va. at 473, 579 S.E.2d at 169). Plaintiff then argued that this Court "*must* permit Plaintiff to withdraw and amend the default admissions, as both elements of the Shaheen test are met." *See* Pls.' Mot. to Withdraw and Amend, at 5 (emphasis supplied). However, in the court's view, even if the Shaheen test is satisfied here, a decision whether to grant Plaintiff leave to withdraw and amend his default responses remains discretionary. *See* Va. Sup. Ct. R. 4:11(b) ("the court *may* permit withdrawal or amendment when . . . .") (emphasis supplied); *see*

also Perel v. Brannan, 267 Va. 691, 704, 594 S.E.2d 899, 907 (2004) ("The permissive word 'may' [in Rule 4:11(b)] makes the court's decision on the issue discretionary.").

On the first prong of the Shaheen test, Plaintiff has satisfied this Court that withdrawal and amendment of his default admissions to Request Nos. 5, 6, 7, 9, 10, 11, 12, 13, 19, 20, 21, 24, 25, and 26 would subserve the presentation of the merits. Entering default admissions to these Requests would amount to a stipulation that Plaintiff cannot prove crucial elements of his case—namely, negligence and proximate cause—and would render Plaintiff unable to dispute alternative theories of causation. These issues are at the core of Plaintiff's cause of action, and default admissions to the aforementioned Requests "would practically eliminate any presentation of the merits of the case." *See* Shaheen v. County Of Mathews, 265 Va. 462, 474, 579 S.E.2d 162, 169–70 (2003) (citing Hadley v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995). The centrality of these default admissions to the issues in the case is reflected in Defendants' subsequent Motion for Summary Judgment, which exclusively relies on the admissions. *See* Def.'s Mot. for Summ. J., at 4 (Dec. 7, 2020) ("Based on these admissions, the Plaintiff has no evidence to prove why and how the accident happened. Therefore, Defendants are entitled to summary judgment in their favor . . . . .") (internal quotations omitted).

Turning to the second part of the Shaheen test, Defendants have failed to carry their burden of demonstrating that amendment or withdrawal of Plaintiff's admissions would prejudice Defendants in maintaining their defense. Looking only at prejudice that would directly result from the withdrawal of the admissions, the Court is not convinced that Defendants would suffer such prejudice. Not only were the facts admitted in dispute, but their admission also resulted in a near concession of Plaintiff's case, making it unlikely that Defendants could have reasonably relied upon them. *See, e.g.*, McClanahan v. Aetna Life Ins. Co., 144 F.R.D. 316, 320 (W.D. Va. 1992) ("[W]here a party all but conceded liability through its admission in a contested case, it is unlikely that the opposing party could have reasonably relied on the truth of the admission."). There is no indication that Defendants forewent any discovery in reliance on the admission, nor that it could not locate and depose witnesses who might provide the facts admitted. *See* id. at 321 (referring to the forgoing of discovery in reliance on admissions and a party's inability to locate vital

witnesses as possible examples of prejudice). With trial set for August, Defendants have ample time to do so.

The Court agrees with Defendants that Plaintiff did have actual notice of the Requests, having received both an emailed copy of the Requests and formal posted service. While Plaintiff—whether proceeding *pro se* or through counsel—is responsible for timely responses to discovery requests as required by the Rules, the Court finds that entering default admissions to these Requests would nevertheless contravene the purpose of requests for admissions: "to expedite a trial by narrowing the contested facts and issues." *See* Shaheen, 265 Va. at 475, 579 S.E.2d at 170. That said, "the rule should not be used as a weapon 'with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements.'" *Id.* (quoting Perez v. Miami-Dade County, 297 F.3d 1255, 1264 (11th Cir. 2002). While the Court is not convinced that this was Defendants' intention, default admissions here would have the effect of Plaintiff admitting away essential elements in this case.

Because both elements of the two-part test from Shaheen are established, the requirements of Rule 4:11(b) are met for Request Nos. 5, 6, 7, 9, 10, 11, 12, 13, 19, 20, 21, 24, 25, and 26. Accordingly, the Court will permit Plaintiff to withdraw and amend its responses to these Requests.

Plaintiff also argued that all of the aforementioned requests—except for Request Nos. 6 and 13 and with the addition of Request Nos. 22 and 23—are not proper requests for admissions, and therefore that no default admissions were obtained for these Requests. *See* Pl.'s Br. in Further Supp. of Mot. to Withdraw and Amend Default Resps. to Defs.' Reqs. for Admis., at 10 (Feb. 17, 2021); *see also* General Acc. Fire & Life Assur. Corp. v. Cohen, 203 Va. 810, 814, 127 S.E.2d 399, 402 (1962 (finding no default admissions where request was improper). Having concluded that the Shaheen test is satisfied as to Request Nos. 5, 6, 7, 9, 10, 11, 12, 13, 19, 20, 21, 24, 25 and 26, the Court need not determine at this time whether those Requests are proper; Plaintiffs are free to incorporate such objections in its responses and resolve that dispute with Defendants.

Plaintiff did not argue that that its default admissions to Request Nos. 22 and 23 met the Shaheen test, so the only possible basis for withdrawing those admissions would be the impropriety of the Requests.

Virginia law contemplates "a rather liberal application of discovery rales in civil cases, allowing the discovery of information that 'is relevant to the subject matter involved in the pending action' or that is 'reasonably calculated to lead to the discovery of admissible evidence.'" Hirsch v. CSP Nova, LLC, 98 Va. Cir. 286, at *4 (Loudon County, 2018) (citing Va. Sup. Ct. R. 4:1(b)(1)). "Every fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant." Va. Elec. & Power Co. v. Dungee, 258 Va. 235, 260, 520 S.E.2d 164, 179 (1999). In light of this low bar, the Court finds that these Requests are proper under Rules 4:11 and 4:1(b) and will enter default admissions on these Requests.

Similarly, Plaintiff has not met its burden under Shaheen with respect to Request Nos. 1, 2, 3, 4, 8, 14, 15, 16, 17, and 18. Per Rule 4:11(b), the Court must enter default admissions to those Requests as well.

Conclusion

The Court grants Plaintiff's Motion as to Request Nos. 5, 6, 7, 9, 10, 11, 12, 13, 19, 20, 21, 24, 25 and 26. Plaintiff may provide amended responses to these Requests on or before April 1, 2021. The Court finds that Plaintiff has admitted Request Nos. 1, 2, 3, 4, 8, 14, 15, 16, 17, 18, 22, and 23. Those matters, then, are conclusively established for purposes of this litigation. *See* Va. Sup. Ct. R. 4:11(b).

The Court will also deny Defendants' Motion for Summary Judgment. Having granted Plaintiff leave to amend several of his default responses, there remain genuine issues of material fact.

Counsel for Plaintiff is requested to prepare an Order consistent with the rulings of the court.

Applicant Details

First Name	**Janki**
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Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**3012668020**

Applicant Education

BA/BS From	**University of Maryland-College Park**
Date of BA/BS	**May 2015**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 17, 2020**
Class Rank	**33%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission